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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PETE LE'MON,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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June 22, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Is a *per se* violation of the duty of fair representation established where employees are terminated from employment because the labor organization that is their exclusive representative under § 9(a) of the National Labor Relations Act did not fulfill its mandatory duty to file the notice of strike required by § 8(d) of the Act?

2. Is a violation of the duty of fair representation established where the labor organization that is the employees' exclusive representative under § 9(a) failed to advise them that it had *not* fulfilled its mandatory duty to file the notice of strike required by § 8(d) both prior to the employees' vote on whether to ratify their employer's bargaining proposal or engage in a strike, and again after the strike began when that default was questioned—and, as a result, those employees were terminated from employment?

3. If the duty of fair respresentation provides employees with no relief when they are discharged from their employment solely because the labor organization which is their § 9(a) exclusive representative fails to file the notice of strike required by § 8(d) and to advise the employees of that statutory default, are the employees deprived of their right to due process of law under the Fifth Amendment to the Constitution of the United States?

PARTIES TO THE PROCEEDINGS BELOW

The parties named in the caption in this Court are the parties to the proceedings below, namely:

Petitioner: Pete Le'Mon.

Respondent: National Labor Relations Board.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTRODUCTION

Petitioner Pete Le'Mon respectfully requests that a writ of certiorari issue to the United States Court of Appeals.

OPINIONS BELOW

This case originated with charges Le'Mon filed with the National Labor Relations Board (NLRB) through its Regional Office in Phoenix, Arizona. The NLRB Regional Director issued a complaint which was heard before an Administrative Law Judge (ALJ). The ALJ issued a recommended decision and order. The ALJ's recommended decision was reviewed by a panel of the NLRB, which issued a decision. The NLRB's decision was reviewed by the United States Court of Appeals for the Tenth Circuit. This process resulted in the following decisions:

The ALJ's recommended decision and order is dated March 4, 1987, is officially reported at 291 N.L.R.B. No. 41, and is reprinted in the Appendix (App. __) at 30a.

The NLRB's decision and order is dated September 30, 1988, is officially reported at 291 N.L.R.B. No. 41, unofficially reported at 131 L.R.R.M. 1199, and is reprinted at App. 21a.

The initial decision of the United States Court of Appeals for the Tenth Circuit is officially reported at 902 F.2d 810 (1990), is unofficially reported at 134 L.R.R.M. 2209, and is reprinted at App. 11a. The judgment thereon is reprinted at App. 9a.

Pete Le'Mon, the petitioner here, filed a timely petition for certiorari with this Court from the initial decision of the Tenth Circuit in this case. This Court, on March 25, 1991, remanded the case for reconsideration in light of *United Steelworkers v. Rawson*, 495 U.S. 362 (1990), and *Air Line Pilots Association v. O'Neill*, 499 U.S. ___, 111 S. Ct. 1127 (1991). *Le'Mon v. NLRB*, ___ U.S. ___, 111 S. Ct. 1383 (1991).

On remand, the Tenth Circuit affirmed its initial decision, although on different grounds. *Le'Mon v. NLRB*, 952 F.2d 1203 (December 20, 1991) (*Le'Mon II*). The decision on remand is reprinted at App. 3a. Le'Mon filed a timely petition for rehearing and suggestion for rehearing en banc. The Court, by order entered March 24, 1992, denied both the petition for rehearing and the suggestion for rehearing en banc. The order is unpublished, and is reprinted at App. 1a.

JURISDICTION

The decision of the Tenth Circuit on remand from this Court, App. 3a, was entered December 20, 1991. Le'Mon's timely petition for rehearing and suggestion for rehearing en banc, App. 59a, was denied on March 24, 1992. App. 1a. This Court therefore has jurisdiction over the instant petition under 28 U.S.C.A. § 1254(1) (West 1990) and Rule 13.4 of its rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fifth Amendments to the Constitution of the United States are relevant to this case. In addition, §§ 7, 8(b)(l)(A), 8(d), 9(a) and 10(f) of the National Labor Relations Act (NLRA), respectively 29 U.S.C.A. §§ 157, 158(b)(l)(A), 158(d), 159(a), and 160(f) (West 1990), as well as 29 U.S.C.A. §§ 141(b), 151 (West 1990), are germane to this Court's consideration of the case. All relevant constitutional and statutory provisions are reprinted verbatim and in order, beginning at App. 55a.

STATEMENT OF THE CASE

Material Facts

Le'Mon was employed by Aztech International, Inc. (Aztech), as a silkscreen paint specialist, until October of 1985. His employment was within a bargaining unit of employees represented by Sheet Metal Workers' International Association Local No. 49 (SMW). SMW was the exclusive representative of unit employees, including Le'Mon, under authority of NLRA § 9(a) for purposes of collective bargaining, contract administration, and grievance adjustment with Aztech on the employees' behalf.

The Aztech/SMW collective bargaining agreement covering unit employees was due to expire on September 30, 1985. In the late Summer of 1985, SMW conducted a strike vote among the Aztech employees it represented. The membership authorized a strike to be conducted. On September 29, 1985, SMW had received Aztech's "final offer," and held a membership vote to

accept or reject the bargaining agreement proposed by Aztech. The membership voted to reject Aztech's offer.[1]

A strike ensued on October 1, and effectively ended on October 5, 1985, when employees learned through newspaper accounts or letters from Aztech that the strike was "illegal." Thereafter, Aztech would only take the striking former employees back to employment as "new hires."

SMW concedes that the strike was illegal, and that it had *not* filed with the Federal Mediation and Conciliation Service (FMCS) the strike notice mandated by NLRA § 8(d). The record before the ALJ explicitly shows SMW's *admission* that, "service of [the required] notice on the F[ederal] M[ediation] and C[onciliation] S[ervice] was given by lawyer (inaudible) September 11, 1985, which was received by the FMCS on September 17, 1985."[2] It shows SMW's additional *admission* that the notice "did *not* comply with the thirty-day time period required for notice of the existence of the dispute as set forth in Section [8(d)(3)] of the [NLRA]."[3] And the record contains SMW's further *admission* that "its conduct [of the strike] began in less than thirty days after service of the notice on FMCS."[4] As SMW's lawyer put it: "Yeah, well, obviously I'm stuck with the fact that we gave the notice on the 11th, it was received on the 17th by the Service, a strike commenced on October 1. Now, I'm not going to deny any of those facts * * * that's obvious."[5] Thus,

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[1] There is a factual dispute, irrelevant to this petition, as to the exact date within this period that the strike was authorized by SMW membership, as well as to whether the authorization was unanimous or not.

[2] Transcript (Tr.__) of proceedings before the ALJ, October 21, 1986, at 8.

[3] Tr. 9 (emphasis added).

[4] *Id.*

[5] Tr. 17.

the strike was begun a full nineteen days before one was permitted under § 8(d).

Even more fundamentally to this Court's review of the issues in this case, the record below shows that SMW *never* advised the Aztech employees at the meetings held in September of 1985 that the notice required by § 8(d) had *not* been timely filed. According to SMW records, meetings were held on September 18, 26, and 30.[6] The September 30, 1985 meeting was crucial, as it was held "[t]o accept or reject the contract."[7] Thus, in voting on September 30, the employees were denied the vital piece of information that SMW had not timely filed the notice which was a mandatory precondition to a lawful strike. As the ALJ so sensitively put it, despite his harsh decision described below, "I'm sorry that it caused such pain for the employees, who found themselves hooked by the language of Section 8-D, which deprived them of employment status."[8]

Litigation History

On October 29, 1985, Le'Mon filed charges with the NLRB's Regional Office in Phoenix. He alleged that SMW violated NLRA § 8(b)(1)(A) because, *inter alia*, it did not advise the Aztech employees it represented that SMW had not timely filed the § 8(d) notice. The Regional Director issued a complaint on those charges on April 21, 1986.[9]

The issues raised by the Regional Director's complaint were presented to James M. Kennedy, ALJ, on October 21, 1986. ALJ

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[6] Tr. 243.

[7] Tr. 244.

[8] Tr. 255.

[9] App. 49a.

Kennedy issued his decision on March 4, 1987.[10] ALJ Kennedy first identified two separate standards for duty-of-fair-representation (DFR) violations. First, he concluded that SMW's duty "was not a fiduciary one, for the Supreme Court and the Board have both held that the relationship requires only that the statutory representative provide equal protection to the employees it represents."[11] On the other hand, ALJ Kennedy also concluded that "[a]s a result of *Vaca* [*v. Sipes*, 386 U.S. 171 (1967)] the duty of fair representation is now often described as one in which a union may not act arbitrarily, invidiously, irrelevantly, unfairly or perfunctorily in carrying out its representational duties."[12] He acknowledged that "the duty itself remains somewhat murky depending on the fact pattern being presented."[13] After finding that "if [SMW's] duty is that of a fiduciary, it failed to meet it[,]" ALJ Kennedy ultimately found no violation in this case because, "only those [acts] which have been *motivated by* hostile, invidious, irrelevant, or unfair considerations [result in a DFR violation]."[14]

The NLRB affirmed in a decision and order dated September 30, 1988.[15] The NLRB found that SMW's "deficiencies in representing the employees amounted to no more than mere

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[10] App. 30a.

[11] App. 39a.

[12] App. 40a.

[13] App. 41a.

[14] App. 46a (citing cases) (emphasis added). Also, at App. 46a n.7, the ALJ noted that, "[t]he Board has imposed a fiduciary obligation on unions in the enforcement of union security clauses."

[15] App. 21a.

negligence."[16] The NLRB admonished that "[t]he representation that [SMW] provided the employees in this case may not meet the standards of competence and caution that the Board would like to see observed."[17] Despite the fact that SMW failed to meet "the standards of competence and caution" the NLRB would otherwise have liked, the NLRB found no violation of § 8(b)(1)(A) because "[a] breach of duty of fair representation occurs only when the representative's conduct is 'arbitrary, discriminatory, or in bad faith.'"[18] The NLRB did not "consider the conduct here to have been arbitrary."[19] As a caveat, the NLRB "assume[d], arguendo, that a union that takes action in 'reckless disregard' of its statutory duties to unit employees violates its duty of fair representation."[20] But remarkably, the NLRB suggested that the employees' only remedy for SMW's nonfeasance and misfeasance was to "boot the rascals out," and not compensation for the losses resulting from that misconduct.[21]

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[16] App. 22a. The NLRB panel agreed on this point. It split 2-1 over whether SMW's treatment of employees, on or after October 2, 1985, was a further violation of the DFR.

[17] App. 24a.

[18] *Id.*

[19] *Id.*

[20] *Id.* at n.5.

[21] The NLRB said: "[SMW's] deficiency in representation is a matter for employees to consider in selecting and supporting their representative, not a matter correctable under Section 8(b)(1)(A) of the Act." App. 24a-25a.

Le'Mon filed a petition for review of the NLRB's decision with the United States Court of Appeals for the Tenth Circuit.[22] The Tenth Circuit affirmed the NLRB in a decision filed May 7, 1990.[23] Judgment was entered thereon on that same date.[24] In its decision, the court noted that, "[b]oth *Vaca* and *Foust I* involved a union's handling of an *individual* union member's grievance, while in the present case the union's negligent conduct affected *all* its members."[25] Distinguishing those cases from Le'Mon's, the court said that "the injured party here is not an individual or group singled out for treatment different from that accorded the majority, but the entire class of Aztech employees represented by the Union."[26] On that basis, the court "decline[d] to extend the duty to situations in which the injury suffered is common to the majority of represented employees."[27] Like the NLRB, the court eschewed any relief for employees in Le'Mon's situation, saying, with complete disregard for the facts, "the Aztech employees had a remedy against the Union for the harm caused by the Union's negligence and they used that

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[22] The court had jurisdiction over Le'Mon's petition for review, as he is a "person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," under NLRA § 10(f), 29 U.S.C.A. § 160(f) (West 1990).

[23] App. 11a.

[24] App. 9a.

[25] App. 15a. *Vaca* refers to *Vaca v. Sipes*, 386 U.S. 171 (1967). *Foust I* refers to *Foust v. Electrical Workers*, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979) (emphasis in original text).

[26] App. 17a.

[27] App. 20a.

remedy: they petitioned for an election to oust the Union as the exclusive bargaining representative."[28]

Le'Mon filed a timely petition for certiorari with this Court.[29] This Court granted Le'Mon's petition, and remanded the case for consideration "in light of *Air Line Pilots Association, International v. O'Neill*, 499 U.S. ___ [, 111 S. Ct. 1127] (1991) and *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. [362] (1990)."[30]

On remand, the Tenth Circuit stated: "We affirm after reconsideration of the case, albeit on grounds different from those underlying our decision in *Le'Mon I*."[31] The court acknowledged that "[a]rbitrary union conduct breaches the duty of fair representation and invites sanction by the [National Labor Relations] Board and the courts."[32] The court also acknowledged that "[a] finding that [union] conduct amounts to mere negligence should be reviewed under the same [substantial evidence] standard."[33] Despite recognition of the applicable legal and review standards, and without examining whether the "record as a whole" supports (or requires) the conclusion that the union's conduct was more than "mere negligence" and even a *per se* violation of the duty of fair representation, the court

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[28] App. 18a. Of course, the court did not, and could not, explain how ousting SMW restores the employees' economic losses resulting from its DFR violation.

[29] *Le'Mon v. NLRB*, 902 F.2d 810 (10th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3180 (U.S. Sept. 5, 1990) (No. 90-400).

[30] *Le'Mon v. NLRB*, ___ U.S. ___, 111 S. Ct. 1383 (1991), *vacating judgment and remanding* 902 F.2d 810 (10th Cir. 1990).

[31] *Le'Mon v. NLRB*, 952 F.2d 1203 (10th Cir. 1991), App. at 4a.

[32] App. at 5a.

[33] App. at 6a.

inexplicably concluded: "Where union behavior is merely negligent, nothing more need be done, and courts should not intervene."[34]

Le'Mon filed a petition for panel rehearing with suggestion for rehearing en banc.[35] He there presented his position that the court on remand had "overlooked or ignored" issues presented by *O'Neill* and *Rawson*.[36] He also argued that the panel's decision on remand raised serious and substantial questions under the Fifth Amendment, on grounds that if, in these circumstances, Le'Mon had no relief under the duty of fair representation, then the statute's grant of "exclusive representation" to SMW deprived him of "liberty" and "property" interests in his employment.[37] The court denied Le'Mon's petition and suggestion by clerk's order dated March 24, 1992, and without an opinion.[38]

ARGUMENT FOR ALLOWANCE OF THE WRIT

This Court should grant a writ of certiorari for two reasons: *First*, although purporting to rely on a decision of the Court of Appeals for the Ninth Circuit[39] for the proposition that the DFR does not apply to a union's "merely negligent" conduct, the Court of Appeals for the Tenth Circuit instead has actually ruled

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[34] App. at 8a.

[35] App. at 62a.

[36] App. at 69a-75a.

[37] App. at 75a-76a.

[38] App. at 1a.

[39] *Eichelberger v. NLRB*, 765 F.2d 851 (9th Cir. 1985), *cited in* App. at 6a.

in conflict with that decision.[40] *And second*, by holding the DFR inapplicable to "merely negligent" violations of the mandatory duty to file the mandatory § 8(d) notice, the Court of Appeals has drawn into serious question the constitutionality of § 9(a), thereby implicitly deciding an important issue of federal labor and constitutional law that has not been, but should be, explicitly settled by this Court.[41]

The Court of Appeals' opinion in *Le'Mon II* explicitly rests on two propositions:

- Substantial evidence supports the NLRB's finding that SMW's conduct amounted only to "mere negligence." And,

- "Mere negligence" cannot constitute a violation of the DFR.[42]

The court's denial of Le'Mon's petition for rehearing and rehearing en banc also implicitly rejects the argument that:

- If the DFR provides no remedy here, Le'Mon has been deprived of liberty and property without due process (indeed, without *any* process) of law.[43]

On each of these points, the Court of Appeals has ruled in irreconcilable conflict with the legitimate purposes of and limits upon exclusive representation under § 9(a), this Court's decisions in *O'Neill* and *Rawson*, and the requirements of the Due Process

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[40] Rule of the Supreme Court of the United States 10.1(a) justifies review on that ground alone.

[41] Rule 10.1(c).

[42] App. at 6a.

[43] *See* App. at 75a.

Clause of the Fifth Amendment to the Constitution of the United States.

I. The substantial-evidence rule does not permit the Court of Appeals to accept the NLRB's view that SMW's conduct amounted only to "mere negligence."

Citing the Ninth Circuit's earlier opinion in *Eichelberger*, the Court of Appeals noted that "[a] finding [by the NLRB] that [union] conduct amounts to mere negligence should be reviewed under the [substantial-evidence] standard."[44] As *Eichelberger* itself demonstrates, however, that the record may contain substantial evidence of "mere negligence" does not necessarily preclude it from also containing substantial evidence of "'something more' than mere negligence, i.e., arbitrary conduct violative of [the DFR]."[45] Thus, contrary to the Court of Appeals' view, the issue here is *not* whether "the evidence is insufficient to support the [NLRB's] characterization of the conduct of the Union representatives as [mere] negligence," but instead, whether the evidence belies the NLRB's denial that that conduct was *more* than "merely negligent."

Such is this case. The Court of Appeals focussed too narrowly on whether "the Union representatives' exhortation to continue the strike *after* they learned of its possible illegality goes beyond mere negligence."[46] The record as a whole paints a broader picture of culpability:

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[44] App. at 6a, citing *Eichelberger v. NLRB*, 765 F.2d 851, 856 (9th Cir. 1985).

[45] *Eichelberger*, 765 F.2d at 856.

[46] App. at 7a (emphasis added).

Before the strike began —

- The strike was illegal because one of SMW's agents (an attorney) had not timely filed with the FMCS the notice required by § 8(d)(3).[47]

- At three meetings—*including the crucial one held to accept or reject the contract*—other of SMW's agents failed to advise the employees that the union had not timely filed the notice that was a mandatory precondition to a lawful strike, and in the absence of which "[a]ny employee who engages in a strike * * * shall lose his status as an employee of the employer engaged in the * * * labor dispute."[48]

After the strike began —

- The day the strike began, all the employees received a letter from Aztech stating that the strike was illegal, that the employees were not protected by the NLRA against discharge, and that all of them were terminated "effective immediately."[49]

- The next day, an article in a local newspaper reported that Aztech had filed an unfair-labor-practice charge against SMW, and that the NLRB Resident Officer had stated that the picketing was illegal.[50]

- Both before and after the newspaper article appeared, SMW agents Briggs and Gilliland were aware of

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[47] Tr. at 8-9, 17.

[48] 29 U.S.C.A. § 158(d) (West 1990), App. at 58a.

[49] App. at 35a-36a.

[50] App. at 36a.

Aztech's contention that the strike was illegal, but "did not believe it," and told employees that the statements in the discharge letter were only "a company tactic."

- Briggs' and Gilliland's disbelief of Aztech's assertion was not based on any knowledge or expertise they had,[51] or on advice of SMW's attorney, who was "out of town" when Briggs called the attorney's office to verify the employer's contention. Rather, it rested solely on Briggs' protracted failure to obtain the necessary information.[52]

- Thus, prior to and during the strike, one SMW agent—its attorney—knew that the strike was illegal because of his own failure to file a timely § 8(d) notice. During the strike, two SMW agents—Briggs and Gilliland—had *actual* notice that both Aztech and an NLRB representative considered the strike illegal. And, during the strike, one SMW agent—Briggs—"was unable to find out whether the [§ 8(d) notice] had been sent timely" "because of [the attorney's] absence," but "decided to 'tough it out'" anyway,[53] apparently without contacting the FMCS for verification of the true facts.

The NLRB opined that, in disregarding the employer's letter as "company 'rhetoric' or a company 'ploy,' and urg[ing] the strikers to 'stick together,'" "without further investigating the

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[51] As the NLRB noted, "[t]he agents were not lawyers and did not seem to understand the effect that the failure to give proper [§] 8(d) notice had on the strikers' status as employees." App. at 23a (footnote omitted). Nevertheless, although aware of their own ignorance of the facts and controlling legal principles, the agents blindly plunged ahead to recommend to the employees a course of action that had catastrophic results.

[52] App. at 37a.

[53] *Id.*

situation or obtaining the advice of [SMW's] attorneys,"[54] Briggs and Gilliland

> may have acted negligently, but their conduct was not so lacking of a rational or logical basis as to be arbitrary.
>
> In meeting the employees' questions, the agents assessed events from a practical point of view. As they saw it, loss of employment is a risk in any strike, and employees' best protection is to stick together.[55]

Exactly the opposite is true: "[A]ssess[ing] events from a *practical* point of view"—in deliberate ignorance of both the facts and the legal consequences thereof—was *non*rational and *il*logical where the *statutory* mandate of § 8(d) controlled. For, by force of § 8(d), loss of employment was not simply "a *risk* in [continuing the] strike," but a *certainty*; and the employees gained *no* "protection" by "stick[ing] together" under the delusion of SMW's misrepresentations about Aztech's "rhetoric" and "ploys," but only guaranteed the forfeiture of their status as employees and the benefits that status conferred on them.[56]

In sum, the Court of Appeals was doubly wrong to say that

> Le'Mon rests his contention that the Union's conduct deserves sanction on his imputation of knowledge of illegality to the Union representatives. The [NLRB]

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[54] NLRB Decision, App. at 22a.

[55] App. at 23a.

[56] The NLRB suggested that SMW was not "reckless" because, "even if the agents had understood that the strikers lost status as employees * * *, there was little they could do to benefit the employees at that point." App. at 24a. This gratuitous supposition leaves aside the possibility that, if SMW had quickly admitted the illegality of and called off the strike, Aztech would have changed its position with respect to terminating the employees.

> found that they did not know * * * and we have no reason to upset this factual finding.[57]

First, one SMW representative (its attorney) *did* know of the illegality of the strike. Second, two other SMW representatives (Briggs and Gilliland) were on notice of the illegality, but in the face of their own inexpertise in labor law and inability to confirm matters with SMW's attorney (both of which they were aware) chose to disregard the dire consequences § 8(d) imposes, and irresponsibly urged the employees to initiate and continue an ultimately disastrous course of conduct—in effect, playing Russian roulette with the employees' jobs. To disregard what SMW's own attorney knew, because its other two agents did not know as much; and then to disregard that the other two were on notice that the attorney had information crucial to the situation (but the specifics of which were unknown to them) is to ignore or flout, not to apply, the substantial-evidence rule.[58]

II. SMW's conduct constitutes a breach of the DFR whether labelled "mere negligence" or "reckless disregard" of the employees' rights.

A. The Court of Appeals' reliance on *Eichelberger* to deny that "mere negligence" can constitute a violation of the DFR is doubly peculiar, because *Eichelberger* recognized that, in *Dutrisac*,[59] the Ninth Circuit had held that "negligence may violate [the DFR] where both the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his

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[57] App. at 7a.

[58] "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[59] *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983).

claim."[60] As *Dutrisac* explained, "more instructive" than attaching labels such as "simple negligence" to union misfeasance or nonfeasance is to consider "the types of unintentional errors * * * that usually are held to breach the [DFR]."[61]

Present in this case are the six elements necessary to make out a DFR violation under *Dutrisac*, as applied in *Eichelberger* and the later decision in *Peterson*:[62]

- "[A]n employee's interest in not being fired * * * is strong."[63]
- SMW "failed to perform a procedural or ministerial act"[64] under § 8(d).
- "[T]he act in question did not require the exercise of judgment."[65]
- "[T]here was no rational and proper basis for the union's conduct";[66] and SMW's "total failure to act * * * is unexplained and unexcused."[67]

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[60] *Dutrisac*, 749 F.2d at 1274, *quoted in Eichelberger*, 765 F.2d at 855.

[61] 749 F.2d at 1272-73.

[62] *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985).

[63] *Eichelberger*, 765 F.2d at 855.

[64] *Peterson*, 771 F.2d at 1254.

[65] *Id.*

[66] *Id.*

[67] *Dutrisac*, 749 F.2d at 1270.

- "[T]he union's failure to perform [that] ministerial act completely extinguishe[d] the employee's right" to employment.[68] And,

- SMW's failure was "the solitary and indivisible cause of the complete extinguishment of [the] employee's * * * rights."[69]

Therefore, SMW's conduct constituted a breach of the DFR even if that conduct could be labelled by someone as "simple negligence."

B. Although eschewing the use of "mere[ ] labels," *Dutrisac* did recognize that "a[union's] unintentional mistake is arbitrary if it reflects a 'reckless disregard' for the rights of the individual employee, but not if it reflects only 'simple negligence violating

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[68] *Id.* at 1274.

[69] *Eichelberger*, 765 F.2d at 855. The NLRB lamely offered that "the employees were free to accept the Union's advice or the Employer's advice [as to striking]. There is no evidence that [SMW], by threat of fine or other retaliation, coerced the employees to continue collective action. The employees could have decided to abandon the strike or to apply individually for employment." App. at 24a. This too facile observation forgets that Le'Mon lost his employment, not simply because *he* was on strike, but solely because: *SMW* failed to file the § 8(d) notice, thus rendering the strike illegal *ab initio*; *SMW* failed to notify Le'Mon of this crucial fact; and, after its lay agents should have realized that a serious problem existed, *SMW* failed to correct—and, indeed, created and exacerbated—the employees' misunderstanding. As Le'Mon's § 9(a) exclusive representative, SMW alone had the authority, and the duty, to give the § 8(d) notice. Le'Mon was powerless in the premises. Therefore, "[h]aving undertaken to act affirmatively on behalf of [Le'Mon], the Union is precluded from escaping responsibility by asserting that [Le'Mon] could or should have [taken action] rather than depend on it." *Foust v. Electrical Workers*, 572 F.2d 710, 717 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979).

the tort standard of due care.'"[70] In the totality of the circumstances here, SMW's actions (even if arguably "unintentional") manifested "reckless disregard" for Le'Mon's employment rights.[71] Yet, the crucial factual-*cum*-legal element in this case is the unqualified notice-requirement of § 8(d) that SMW failed to satisfy. This element renders SMW's conduct a violation of the DFR, even if that conduct arguably amounted only to "mere negligence," for three reasons:

First, § 8(d) embodies the vital congressional policy of fostering collective bargaining, in preference to strikes and other forms of direct action that disrupt interstate commerce.[72] To excuse as an unfair labor practice or a breach of the DFR a union's failure to comply with § 8(d), simply because that failure is "merely negligent," would subordinate this overarching purpose of the congressional scheme of labor-management relations to some "lowest common denominator" of union behavior. Knowing that many unions acting as exclusive representatives under § 9(a) exercise tremendous power to disrupt the flow of interstate commerce,[73] Congress could never have intended that national labor law should immunize such disruption were its source the unions' "merely negligent" behavior. For the deleterious effects

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[70] 749 F.2d at 1272, *quoting Robesky v. Qantas Empire Airways, Ltd.*, 573 F.2d 1082, 1089-90 (9th Cir. 1978). *See United Steelworkers v. Rawson*, 495 U.S. 362, ___, 110 S. Ct. 1904, 1911 (1990) ("The courts have *in general* assumed that mere negligence * * * would not state a claim for breach of the duty of fair representation, and we endorse that view today." (Emphasis added.))

[71] *See, e.g., Robinson Insurance & Real Estate, Inc. v. Southwestern Bell Telephone Co.*, 366 F. Supp. 307, 311 (W.D. Ark. 1973)("carelessness or recklessness * * * that shows utter indifference to the consequences that may result"); *Fidelity Leasing Corp. v. Dun & Bradstreet*, 494 F. Supp. 786, 790 (E.D. Pa. 1980) ("a want of even scant care").

[72] *See* 29 U.S.C.A. §§ 141(b), 151 ¶¶ 1, 3-5 (West 1990) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 6-10 (1937).

[73] *See* 29 U.S.C.A. § 151, ¶ 4 (West 1990).

on interstate commerce—and the reach of Congress' power to intervene[74]—are identical, whether a statutorily unauthorized strike arises from "mere negligence," from "reckless disregard" of others' rights, or from intentionally malicious conduct. Therefore, the policy undergirding § 8(d) calls for a rule deeming *any* failure to give the notice that section prescribes a *per se* violation of the DFR.

Second, in line with Congress' deep concern with limiting the incidence of strikes that further bargaining or mediation might forefend, following the failure of the union acting as a § 9(a) exclusive representative to file the prescribed notice, § 8(d) penalizes every employee on strike in the most draconian manner: loss of "his status as an employee of the employer engaged in the particular labor dispute." Yet, perforce of § 9(a), each employee has no choice but to rely on his exclusive representative to fulfill the requirements of § 8(d), because exclusive representation "extinguishes the individual's power to order his own relations with his employer and creates a power vested in the chosen representative."[75] The cruel disjunction between the disability of each employee to protect his own job through self-help, and the power of the union to misuse its § 9(a) status to forfeit the employee's job through noncompliance with § 8(d), also argues compellingly for a rule deeming *any* failure to give the notice the latter section prescribes a *per se* violation of the DFR.

Third, such a *per se* rule would not offend, but indeed would follow, the reasoning of this Court's decision in *Air Line Pilots Association v. O'Neill*[76] as to what constitutes "arbitrary" conduct under the DFR. *O'Neill* held that "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of

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[74] U.S. Const. art. I, § 8, cl. 3.

[75] *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

[76] 499 U.S. ___, 111 S. Ct. 1127 (1991).

the union's actions, the union's behavior is so far outside a 'wide range of reasonableness[ ]' * * * as to be irrational."[77] That is *always* the case with respect to union violations of § 8(d)—for § 8(d) allows *no* "range of reasonableness" for union conduct; and, therefore, "in light of the * * * legal landscape" the statute paints, failure to follow its exceptionless prescription is necessarily *un*reasonable as a matter of law, and "arbitrary" under the DFR.

A DFR claim arising under § 8(d) differs in kind from DFR claims arising out of a union's negotiation of a contract or processing of a grievance. Where, as in *O'Neill*, a union is involved "in negotiating and accepting [a] settlement,"[78]

> Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.[79]

Here, in contrast, SMW's failure to follow § 8(d) was not part of "negotiating and accepting [a] settlement"—but rather integral to an attempt to win a labor dispute by confrontation, not negotiation. And judicial review of SMW's actions under the DFR will not "permit the court to substitute its own view of the proper bargain for that reached by the union," thereby arguably interfering with a power Congress conferred on the union—but rather will impose liability on SMW precisely because of the latter's

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[77] *Id.* at ___, 111 S. Ct. at 1130.

[78] *Id.* at ___, 111 S. Ct. at 1131 (footnote omitted).

[79] *Id.* at ___, 111 S. Ct. at 1135.

unexcusable violation of a strict congressional mandate. Thus, application of a *per se* rule under the DFR for violations of § 8(d) will place the courts and labor unions in exactly the relationship "between the courts and the legislature": that is, with the judiciary showing *no* deference to the legislature when the latter transgresses constitutional limitations.

Similarly, whereas *O'Neill* held that a union did not breach the DFR by agreeing to a "bad settlement," inasmuch as "[a] settlement is not irrational simply because it turns out *in retrospect* to have been a bad settlement,"[80] here SMW's failure to follow § 8(d) was illegal, indefensible, and predictably disastrous to the employees *ex ante*, not simply "in retrospect." On no basis could such action be considered a "rational" tactic. Moreover, whereas *O'Neill* held that a union's "decision to settle [a dispute] rather than give up was certainly not illogical,"[81] here SMW's failure served no "logical" purpose at all. Finally, whereas *O'Neill* held that the settlement there was advantageous to "a significant number" of employees,[82] here *all* the employees were equally hurt by losing their status as employees through SMW's misfeasance.

Therefore, SMW's conduct should be held a *per se* breach of the DFR, whatever label arguably attaches to the facts.

C. A *per se* rule should also apply here because this case involves SMW's *nondisclosure* of information it alone possessed that was critical to the employees' welfare. At the three meetings before the strike, although SMW (as an institution) knew that the § 8(d) notice had not been timely filed, it failed to disclose this

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[80] *Id.* at ___, 111 S. Ct. at 1136.

[81] *Id.*

[82] *Id.* at ___, 111 S. Ct. at 1137.

fact to the employees.[83] After the strike began, SMW continued to fail to disclose not only this fact, but also its other agents' uncertainty and lack of hard knowledge about whether the notice had been timely filed and what the effect of an untimely filing was. SMW took these actions in the course of purporting to "represent" the employees.

Several courts have recognized that the DFR contains a duty of disclosure.[84] This duty of disclosure reflects the constitutional underpinnings of the DFR, specifically the component of procedural due process recognized in *Steele*.[85] Procedural-due-process rights, however, are *absolute*.[86] Therefore, SMW's failure to disclose critical § 8(d) information should be a *per se* breach of the DFR.

D. In any event, this Court should not shrink from affording Le'Mon a remedy by explicitly adopting a standard under the DFR that distinguishes between "mere negligence" and the "reckless disregard" for employees' rights evidenced here.[87] In litigation under Title 42, United States Code, Section 1983, this

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[83] SMW knew, and had a duty to disclose, because its agent (the attorney) knew, even if the particular speakers at the meeting were ignorant of the problem.

[84] *E.g., Kozera v. Westchester-Fairfield Elec. Contractors Ass'n*, 909 F.2d 48, 49 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 956 (1991); *Alicea v. Suffield Poultry, Inc.*, 902 F.2d 125, 130 (1st Cir. 1990); *Swatts v. United Steelworkers*, 808 F.2d 1221, 1224 (7th Cir. 1986); *Local 860, Teamsters v. NLRB*, 652 F.2d 1022, 1025 (D.C. Cir. 1981).

[85] *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 204 (1944): "Whenever necessary to [ensure fair representation], the union is required • • • to give [employees] notice of and opportunity for hearing upon its proposed action." *Cf. also Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

[86] *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

[87] *Cf. Railway Clerks v. Allen*, 373 U.S. 113, 124 (1963).

Court and other federal courts have taken a parallel tack, separating "deliberate indifference" (which is actionable) from "mere negligence" (which is not).[88] Inasmuch as the DFR derives from *constitutional* concerns over the permissible latitude an exclusive representative may have "arbitrarily" to injure the employees it represents,[89] the application in labor law of the same standard of "deliberate indifference" ("reckless disregard") commonplace in constitutionally-based litigation under § 1983 would be logical and consistent.[90]

III. If SMW's conduct does not constitute a breach of the DFR, Le'Mon has been deprived of "liberty" and "property" without due process of law, in violation of the Fifth Amendment.

Unquestionably, as a result of SMW's misfeasance under § 8(d), Le'Mon, through no fault of his own, has been deprived of his property in "his status as an employee of the employer engaged in the particular labor dispute." This deprivation ultimately derives from Le'Mon's subjection to SMW as his § 9(a) exclusive representative. For exclusive representation "extinguishes the individual [employee's] power to order his own relations with his employer and creates a power vested in the

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[88] E.g., *City of Canton v. Harris*, 489 U.S. 378, ___, 109 S. Ct. 1197, 1204 (1989); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989); *Danese v. Asman*, 875 F.2d 1239, 1242-43 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990); *Carswell v. Bay County*, 854 F.2d 454, 457 (11th Cir. 1988); *Spell v. McDaniel*, 824 F.2d 1380, 1390 (4th Cir. 1987), *cert. denied sub nom. City of Fayetteville v. Spell*, 484 U.S. 1027 (1988).

[89] *Steele*, 323 U.S. at 198-99, 203 (opinion of the Court), 208 (separate opinion of Murphy, J.). *See post*, pages 23-25.

[90] In this case, even the NLRB had no trouble in assuming that a "reckless-disregard" standard could apply. App. at 24a, n.5.

chosen representative,"[91] "strip[s the individual employee] of traditional forms of redress,"[92] and gives unions "a thraldom over the men who desiginate [them]" by "creat[ing] rights in [the] unions overriding those of the employees they represent."[93] And Le'Mon cannot sue SMW's attorney for malpractice.[94]

If Le'Mon has no claim against SMW under the DFR for SMW's failure to fulfill the prescription of § 8(d), simply because SMW's conduct could arguably be characterized as "merely negligent," then § 9(a) deprives Le'Mon of both "liberty" and "property" without due process of law, in violation of the Fifth Amendment. The right of an employee to make contracts with an employer, without membership in or other intermediation by a union, "is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power."[95] Whether § 9(a) exclusive representation *is* "a proper exercise of the paramount police power" in principle this Court

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[91] *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

[92] *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

[93] *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 696-97 (1944) (Rutledge, J., dissenting).

[94] *Peterson v. Kennedy*, 771 F.2d 1244, 1256-59 (9th Cir. 1985). *Peterson* justified this result on the theory that, "[i]f an attorney's conduct falls within the 'arbitrary, discriminatory or bad faith test' * * *, the union member may sue the union for breach of the [DFR]." *Id.* at 1259. Thus, Le'Mon has a claim against SMW under the DFR, or no claim at all against anyone.

[95] *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 251 (1917). It also implicates First-Amendment rights of speech and association. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

has never determined.[96] In creating the DFR, however, the Court *has* recognized that serious constitutional questions would arise were an exclusive representive authorized to ignore rights guaranteed by the Constitution.[97] No reason exists not to apply

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[96]When the constitutionality of the NLRA was first in issue, the NLRB selected its test-cases "intentionally [to] avoi[d] presenting the Court with the 'touchy' and more doubtful question[ ]" of exclusive representation. J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-1937* at 187 (1974). And in *NLRB v. Jones & Laughlin Steel Corp.*, this Court avoided the problem of *exclusiv* representation by interpreting the statute to permit individual employees to bargain directly with their employer over the terms and conditions of their employment. 301 U.S. 1, 45 (1937). *Accord*, *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548-49 (1937)(Railway Labor Act). Only seven years later, in cases raising issues of statutory construction alone, did this Court purport to re-interpret the labor acts to preclude individual contracts under some circumstances. *J.I.Case Co. v. NLRB*, 321 U.S. 332, 334-39 (1944); *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346-47 (1944). Neither of these decisions, however, reconsidered the constitutional matters discussed in *Jones & Laughlin* and *Virginian Railway*, although the statutory constructions adopted in those cases predicated their constitutional holdings. *See* Comment, "The Mechanics of Collective Bargaining," 53 *Harv. L. Rev.* 745, 789-91 (1940). The later decision in *Steele v. Louisville & N.R.R.* also pretermitted the question by creating the DFR, precisely to avoid grappling with the serious problems of due process and equal protection that exclusive representation raises. 323 U.S. 192, 198 (1944). *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967); Weyland, "Majority Rule in Collective Bargaining," 45 *Colum. L. Rev.* 556, 568-69 (1945).

[97] *Steele*, 323 U.S. at 198-99, 203 (opinion of the Court), 208 (separate opinion of Murphy, J.). Although arising under the Railway Labor Act, *Steele* referred to "the like provision of" § 9(a), and cited NLRA judicial precedents and legislative history as authority. 323 U.S. at 200, 202 n.3, *citing inter alia J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), *and Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), *along with Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944)(a Railway Labor Act case that relied on *J.I. Case Co.* as authority). This equation of the two acts is hardly surprising, exclusive representation having been held identical under each in the seven years before. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937), *citing Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548-49 (1937). And the Court immediately extended the DFR from the Railway Labor Act to the

this analysis to a § 9(a) union's statutory duty under § 8(d), the failure to observe which results (as here) in the otherwise uncompensatable loss of an employee's property rights. And no reason exists not to apply this analysis to "merely negligent" failures to observe that duty, either.[98]

On Le'Mon's petition for rehearing, the Court of Appeals refused to address this issue, raising for the first time in any court (Le'Mon believes) the issue of whether § 9(a) exclusive representation is unconstitutional where:

- The § 9(a) representative violates an exceptionless statutory duty, with respect to which the union has no discretion.

- As a direct and foreseeable consequence of that violation, represented employees lose valuable property rights in their employment. And,

- The NLRB and the Court of Appeals hold that the union did not breach its DFR simply because they label the union's conduct "merely negligent"—thereby denying the employees *any* relief, not only against the union but also against any third party.

As the circumstances of this case make clear, the security of employees' most important right under the NLRA—employment

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NLRA, explaining thereafter that *Steele* was the common source of the duty in both statutes. *See Wallace Corp. v. NLRB*, 323 U.S. 248, 255-56 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-38 (1953), *origin explained in Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

[98] *Steele*, after all, rests on the analogy between a union acting as an excluisve representative and a legislature. 323 U.S. at 198-99. And judicial review of legislative acts for (in)consistency with the Constitution turns not on whether the legislature's acts are "merely negligent," "reckless," or "intentional"—but only on whether those acts comport with constitutional standards *vel non*.

itself—demands that this issue be addressed, if Le'Mon has no claim for relief under the DFR.[99]

CONCLUSION

The writ of certiorari requested should be granted in order that this Court can resolve:

1. whether a union exercising authority as "exclusive representative" under § 9(a) commits *per se* violations of the DFR owed all represented employees when it fails to file a timely notice of strike under § 8(d), and further fails to advise employees of that critical fact;

2. whether such a series of defaults by a union in such circumstances is more than "mere negligence" and, therefore, a breach of the DFR; and

3. whether, if the DFR provides no relief for employees discharged from their employment solely because of their exclusive representative's statutory default and subsequent repeated failures to advise employees of that default, are the employees deprived of their right to due process of law under the Fifth Amendment?

These are serious and substantial questions under the NLRA and United States Constitution. And the standards to be applied in determining DFR cases continue to divide the Courts of Appeals. These questions warrant consideration and answers by

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[99] Of course, if possible, the issue should be avoided by deciding that the DFR provides Le'Mon full relief. *See NLRB v. Catholic Bishop*, 440 U.S. 490, 499-500 (opinion of the Court), 508-11 (Brennan, J., dissenting) (1979).

this Court if the DFR is to be, as promised, a "bulwark" protecting employees from harm at the hands of organizations granted powers as "exclusive representative" under our labor laws.

Respectfully submitted,

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June 22, 1992

APPENDIX A

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

March 24, 1992

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETE LE'MON,	)	
	)	
Petitioner,	)	No. 88-2833
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent,	)	
	)	
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 49 AFL-CIO,	)	
	)	
Intervenor.	)	

ORDER
Entered March 24, 1992

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges and SEAY*, District Judge.

Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

This matter comes on for consideration of petitioner's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/
ROBERT L. HOECKER, CLERK

APPENDIX B

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

December 20, 1991

[952 F.2d 1203]
Pete LE'MON, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 49 AFL-CIO, Intervenor.

No. 88–2833.

United States Court of Appeals,
Tenth Circuit.

Dec. 20, 1991.

* * * *

[1204]Before SEYMOUR and BALDOCK, Circuit Judges, and SEAY,* District Judge.

SEYMOUR, Circuit Judge.

On May 7, 1990, we denied Pete Le'Mon's petition for review of a National Labor Relations Board (NLRB) order denying his claim that the Sheet Metal Workers' International Association, Local Union No. 49 (Union) had breached its duty of fair representation. *Le'Mon v. NLRB*, 902 F.2d 810 (10th Cir. 1990) (*Le'Mon I*). Le'Mon claimed that the Union breached its duty by failing to file timely notice of a labor dispute with the Federal Mediation and Conciliation Service (FMCS), and subsequently encouraging a strike rendered illegal by the failure

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* The Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

to file.[1] *Id.* at 811. On March 25, 1991, the Supreme Court vacated the judgment and remanded the case to us for reconsideration in light of its recent decisions in *United Steelworkers of America v. Rawson*, 495 U.S. 362, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990), and *Air Line Pilots Ass'n, Int'l v. O'Neill*, ___ U.S. ___, 111 S.Ct. 1127, 1130, 113 L.Ed.2d 51 (1991). *Le'Mon v. NLRB*, ___ U.S. ___, 111 S.Ct. 1383, 113 L.Ed.2d 440 (1991). We affirm after reconsideration of the case, albeit on grounds different from those underlying our decision in *Le'Mon I*.

I.

In our initial review of the NLRB's decision in this case, we held that the duty of fair representation did not apply to cases where a "union's negligent conduct affected *all* its members." *Le'Mon I*, 902 F.2d at 813. Consequently, we affirmed the NLRB's finding that the Union did not breach its duty of fair representation for reasons other than those advanced by the Board. *Id.* at 815. As a result of our understanding of the scope of the duty, we **[1205]**did not otherwise reach the merits of the NLRB's decision. *O'Neill* holds, however, that the judicially-created duty of fair representation applies to "all union activity," 111 S.Ct. at 1130, thereby invalidating our prior analysis. Consequently, we must again review the NLRB's refusal to find a breach of the Union's duty of fair representation in this case.

II.

The NLRB found that the Union's failure to file with the FMCS and its subsequent encouragement of an illegal strike amounted to mere negligence. *Sheet Metal Workers & Pete Le'Mon*, 291 NLRB No. 41 at 2 (October 6, 1988). The NLRB refused to find the duty violated when the Union's conduct was in good faith and not outside the parameters defined by *Vaca v.*

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[1] We do not restate the facts here. Our earlier opinion fully describes the circumstances underlying this dispute. *See* 902 F.2d at 811-12.

Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). *Id.* at 4-5. Under *Vaca*, a union breaches its duty of fair representation when its conduct is "arbitrary, discriminatory, or in bad faith." 386 U.S. at 190, 87 S.Ct. at 916. The NLRB found the Union's behavior negligent rather than arbitrary, and therefore not in violation of its duty. *Sheet Metal Workers*, 292 NLRB No. 41 at 5.

Arbitrary union conduct breaches the duty of fair representation and invites sanction by the Board and the courts. Thus, "(t)he doctrine of fair representation is an important check on the arbitrary exercise of union power, but it is a purposefully limited check." *Rawson*, 110 S.Ct. at 1912. *Rawson* underscores the restraint courts must exercise in sanctioning union activity. Specifically, the Court held that "mere negligence will not state a claim for violation of [the union's fair representation] duty." *Id.* at 1913. Instead, union members who claim that their bargaining representatives have violated the duty must allege that the union "improperly discriminated among its members *or* acted in arbitrary and capricious fashion in failing to exercise its duties under the collective-bargaining agreement." *Id.* (emphasis added). The passage illustrates the level to which union conduct must rise to invoke a court's sanction. Under *Rawson*, negligent behavior is not arbitrary within the meaning of *Vaca*.

In *O'Neill*, the Court squarely rejected an argument that "a union need owe no enforceable duty of adequate representation because employees are protected from inadequate representation by the union political process." 111 S.Ct. at 1134.[2] The Court reasoned that a union's duty is "akin to the duty owed by other fiduciaries to their beneficiaries" and that, like a legislature, a union's actions are subject to some judicial oversight in addition

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[2] We advanced a similar position in *Le'Mon I*. 902 F.2d at 814.

to the political checks provided by the National Labor Relations Act (NLRA). *Id.*[3] As in *Rawson*, the Court emphasized that substantive review of union activity "must be highly deferential," O'Neill, 111 S. Ct. at 1135, and must be conducted with reference to "the factual and legal landscape at the time of the union's actions." *Id.* at 1130.

The recent Supreme Court decisions, taken together, teach that a court may review all union activity under the duty of fair representation, and that a court may inquire into the substantive merits of a union's decisions. The cases do not, however, retreat from *Vaca*'s limitation of court sanction to union conduct that transcends negligence. "(M)ere negligence on the part of a union does not rise to the level of a breach of the duty of fair representation." *Peters v. Burlington N.R.R.*, 931 F.2d 534, 538 (9th Cir. 1991) (citing *Rawson*).

III.

Both the NLRB and the ALJ found that the Union's conduct amounted to no more than mere negligence. *Sheet Metal Workers*, 291 NLRB No. 41 at 1-2. We must affirm the Board's ruling if its **[1206]** findings "are supported by substantial evidence on the record and if it correctly interpreted and applied the law." *Le'Mon I*, 902 F.2d at 812 (citing cases). "We are not free to overturn the Board's decision because we might have decided the matter differently. Rather, it is our responsibility to ascertain that the Board acts within reasonable bounds and that the supporting evidence is truly substantial." *Presbyterian/St. Luke's Medical Center v. NLRB*, 723 F.2d 1468, 1472 (10th Cir. 1983) (citations omitted). A finding that conduct amounts to mere negligence should be reviewed under the same standard. *See Eichelberger v. NLRB*, 765 F.2d 851, 856 (9th Cir. 1985); *see also*

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[3] Before *O'Neill*, it was by no means settled that a union had a fiduciary duty toward all of its members. Indeed, in *Le'Mon I*, we noted that "no justice has suggested a broader duty with respect to *all* of the represented class of employees." 902 F.2d at 815 n.4.

Highland Superstores, Inc. v. NLRB, 927 F.2d 918, 923 (6th Cir. 1991) (NLRB decisions on mixed questions of law and fact reviewed under substantial evidence standard).

The record supports the Board's findings. Le'Mon adopts the position of the dissenting member of the NLRB panel, *Sheet Metal Workers*, 291 NLRB No. 41 at 6-7 (Chairman Stephens, dissenting), arguing that the Union representatives' exhortation to continue the strike after they learned of its possible illegality goes beyond mere negligence. Mem. Brief of Pete Le'Mon at 13-14. However, Le'Mon does not argue that the evidence is insufficient to support the Board's characterization of the conduct of the Union representatives as negligence. He would simply characterize it differently. Even were we to agree with Le'Mon's characterization, we are not at liberty to substitute our judgment for that of the Board, if there is substantial evidence to support the Board's position. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951).

Le'Mon argues that the Union acted with knowledge of the strike's illegality throughout the relevant period. Mem. Brief of Pete Le'Mon at 13-14. The Administrative Law Judge found that this was not the case. Rather, the Union representatives were unable to verify the employer's claim of illegality and assumed that it was merely a tactic to break the strike. *Id.*; *Le'Mon I*, 902 F.2d at 812. Le'Mon rests his contention that the Union's conduct deserves sanction on his imputation of knowledge of illegality to the Union representatives. The Board found that they did not know, however, and we have no reason to upset this factual finding.

In our earlier opinion, we noted that the availability of ouster of the Union limited the scope of the duty of fair representation. *Le'Mon I*, 902 F.2d at 814. Although the Court in *O'Neill* rejected the notion that ouster is sufficient protection for the majority of union members against all union misbehavior, 111 S.Ct. at 1134, the Court's analogy to judicial review of legislative behavior underscores the important function of this political check. While a democratic check may not suffice to

protect union members against all union action, it does suffice to protect employees against negligent representatives. If the union does not do its job, it may be fired. Here, the employees took action to decertify the union under section 9(c) of the NLRA, 29 U.S.C. § 159(c) (1988), and the union quit rather than face an election. Where union behavior is merely negligent, nothing more need be done, and courts should not intervene.

The order of the NLRB is affirmed.

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

May 7, 1990

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETE LE'MON,	)	
	)	
Petitioner,	)	
	)	No. 88-2833
v.	)	(N.L.R.B. No. 28-CB-2479)
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

JUDGMENT
Entered May 7, 1990

Before SEYMOUR and BALDOCK, Circuit Judges, and SEAY*, District Judge.

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* Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

This cause came on to be heard upon petition for review of an order of the National Labor Relations Board. The matter was heard on the administrative record of the National Labor Relations Board and was argued by counsel.

Upon consideration whereof, it is ordered that the order of the National Labor Relations Board is affirmed. Accordingly, the petition for review is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/
Patrick Fisher
Chief Deputy Clerk

APPENDIX D

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AFFIRMING THE ORDER OF THE NLRB

May 7, 1990

[902 F.2d 810]
PETE LE'MON, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 88-2833.

United States Court of Appeals,
Tenth Circuit.

May 7, 1990.

* * * *

[811]Before SEYMOUR and BALDOCK, Circuit Judges, and SEAY,* District Judge.

SEYMOUR, Circuit Judge.

Pete Le'Mon, one of the employees represented by Sheet Metal Workers' International Association, Local Union No. 49 (Union), argues that the Union's failure to give the Federal Mediation and Conciliation Service (FMCS) timely notice of a labor dispute and the Union's subsequent encouragement of the illegal strike breached the Union's duty of fair representation, thereby constituting an unfair labor practice under section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) (1982) (NLRA). The National Labor Relations Board (NLRB) held that the Union did not commit an unfair labor practice. Le'Mon appeals, and we affirm.

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* The Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

I.

Aztech International, Ltd., is an Albuquerque company that manufactures low temperature electric radiant heating panels and multi-stage indirect/direct evaporative cooling units. All of Aztech's thirty-five production employees were covered by a collective bargaining agreement entered into on October 8, 1981, and effective until September 30, 1985. For several months prior to the contract's termination, the Union engaged in negotiations with Aztech for a new agreement. At the same time, the Union conducted monthly meetings with the employees to discuss the status of the contract talks.

On July 30, 1985, sixty days prior to the expiration of the collective bargaining agreement, the employees voted unanimously (with a few abstentions) to authorize the Union to call a strike should the contract negotiations fail. On September 30, the Union met with the employees to discuss Aztech's final contract offer. Gary Briggs, the Union's business manager, presented the offer and expressed his displeasure with the failure to ban or limit subcontracting by Aztech, the random drug-testing clause, and the lack of wage increases. When asked by an employee whether he would sign this contract, Briggs responded that he would not. Briggs told the employees that their other option was to strike, but that by striking they risked being replaced. According to Briggs, being replaced was no different than being fired. The employees voted by secret ballot to reject Aztech's offer and the next day, October 1, they went on strike and began picketing.

The day the strike began, all the employees received a letter from Aztech's president, Bennett King, which stated that the Union's failure to give timely notice to the FMCS made the strike illegal, that all striking employees therefore were not protected by the NLRA from being fired, and that all striking employees were fired, effective immediately. King then offered to rehire the strikers as new employees if they filled out an application and underwent the standard interview and screening process. In

addition to the letter, Aztech also filed an unfair labor practice charge against the Union.

Under section 8(d)(3) of the NLRA, 29 U.S.C. § 158(d)(3) (1982), the party desiring termination or modification of the collective bargaining agreement (here the Union) is required to give the FMCS notice of an [812]impending labor dispute within thirty days of notifying the other party of its wish to terminate or modify.[1] The Union concedes that it failed to meet this requirement because the letter mailed by the Union's attorney, Gerald Bloomfield, was dated September 11 and was received by the FMCS on September 17, well outside of the thirty-day deadline. Neither Briggs nor the Union's business representative, George Gilliland, was aware of this late notice.

Briggs and Gilliland learned of Aztech's contention that the strike was illegal, but initially they did not believe the allegation and were unable to confer with the Union attorney because he was out of town. When asked about Aztech's letter, the Union officials told the strikers that the company was simply trying to scare them and that the letter was a ploy to break up the strike. Briggs encouraged the strikers to stick together; if they maintained solidarity, he said, chances were good that the economic pressure would force Aztech to accede to the Union's demands and the strikers would regain their jobs. Briggs continued to urge the strikers to "stick together," even after the NLRB's Regional Office issued a complaint against the Union and after a newspaper printed a story on the illegality of the strike. By October 7, however, the strike was obviously

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[1] The purpose of the notice requirement is to "provide for a waiting period during which there can be no strike" and to enable the FMCS to try "to bring about a peaceful settlement." *Procter & Gamble Indep. Union v. Procter & Gamble Mfg.*, 312 F.2d 181, 188 (2d Cir. 1962), *cert. denied*, 374 U.S. 830, 83 S.Ct. 1872, 10 L.Ed.2d 1053 (1963); *see also* R. Gorman, *Labor Law* 425 (1976) ("it was clearly the intention of Congress to have the mediation agencies notified and given an opportunity to intervene in the bargaining prior to the use of economic weapons").

disintegrating, and Briggs told the employees still out on strike that they should attempt to go back to work.

After the failure of the strike, the employees, upset with the Union's handling of the labor dispute, filed a decertification petition under section 9(c) of the NLRA, 29 U.S.C. § 159(c) (1982), in which they sought an election to oust the Union as the exclusive bargaining representative. When the Union received the petition, it disclaimed interest in representing Aztech's production employees.

II.

Le'Mon's principal argument is that the Union breached its duty of fair representation by failing to give notice of a labor dispute to the FMCS within the prescribed time period and by encouraging the Aztech workers to continue with the illegal strike. Before considering Le'Mon's arguments, we note that the appropriate standard of review in labor cases requires that we must affirm the Board's decision if its findings are supported by substantial evidence on the record and if it correctly interpreted and applied the law. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); *Central Soya Co. v. NLRB*, 867 F.2d 1245, 1247 (10th Cir. 1988); *NLRB v. Carbonex Coal Co.*, 679 F.2d 200, 203 (10th Cir. 1982).

Le'Mon relies primarily on our decision in *Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710 (10th Cir. 1978) ("*Foust I*"), *rev'd on other grounds*, 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979) ("*Foust II*"), to support his argument that a breach of the duty of fair representation occurred. *Foust I* involved a radioman employed by the Union Pacific Railroad Company. The Union Pacific dismissed Foust following an on-the-job injury, and his attorney wrote to the appropriate officer of the union to get the discharge decision reversed. We stated that the union failed "to pursue the claim in question despite the fact that it had *full knowledge* of the 60-day limit [for filing the grievance]." *Foust I*, 572 F.2d at 716 (emphasis added). We noted that the union had delayed

unnecessarily, sending letters back and forth between various union officials and insisting that "despite the shortness of time, . . . Foust *personally* submit the claim to them." *Id.* Accordingly, we upheld the court's jury charge as a proper statement of the applicable law and affirmed the jury's determination that the [813]union had breached its duty of fair representation.

As the Supreme Court has held, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967); *see also Foust II*, 442 U.S. at 47, 99 S.Ct. at 2125; *Woods v. North Am. Rockwell Corp.*, 480 F.2d 644, 648 (10th Cir. 1973); *Reid v. International Union, United Auto. Workers*, 479 F.2d 517, 520 (10th Cir.), *cert. denied*, 414 U.S. 1076, 94 S.Ct. 592, 38 L.Ed.2d 483 (1973). Such conduct includes, for example, situations in which a union "arbitrarily ignore[s] a meritorious grievance or process[es] it in perfunctory fashion." *Vaca*, 386 U.S. at 191, 87 S.Ct. at 917. We held in *Foust I* that the union's handling of the grievance was done in a perfunctory manner, and Le'Mon urges us to find that the failure of the Sheet Metal Workers' Union to give the FMCS timely notice was done in a similarly "perfunctory fashion."

Both *Vaca* and *Foust I* involved a union's handling of an *individual* union member's grievance, while in the present case the union's negligent conduct affected *all* its members. This distinction is a significant one, as an analysis of the duty of fair representation reveals, and is one that precludes recovery in the instant case.

The duty of fair representation, a duty which predates the prohibition on union unfair labor practices in the 1947 amendments to the NLRA, is a statutory obligation that "has 'judicially evolved' as part of federal labor law." *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, ___ U.S. ___, 110 S.Ct. 424, 432, 107 L.Ed.2d 388 (1989) (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301, 91 S.Ct. 1909, 1925, 29 L.Ed.2d 473 (1971)). The Supreme Court first recognized the

duty in a Railway Labor Act case. *See Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). In *Steele*, the Railroad had removed five black firefighters, previously assigned to a highly desirable "passenger pool," and replaced them with white firefighters. The Railroad was acting pursuant to a new collective bargaining agreement it had negotiated with its employees' bargaining representative, the Brotherhood of Locomotive Firemen and Enginemen. This union, which by its constitution excluded all blacks from membership, had initiated the negotiations because it "desire[d] to amend the existing collective bargaining agreement in such manner as ultimately to exclude all Negro firemen from the service." *Id.* at 195, 65 S.Ct. at 228. The resulting racially discriminatory agreement formed the basis of the suit against the union and the Railroad.

In analyzing the black firefighters' claim, the Supreme Court acknowledged the statutory right of the majority of any craft to choose its representative responsible for collective bargaining with the employer. But the Court rejected the argument that Congress therefore "intend[ed] to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." *Id.* at 199, 65 S.Ct. at 230. If the union did not owe some duty to represent the minority, the Court reasoned, then minority members "would be left with no means of protecting their interests, or indeed, their right to earn a livelihood by pursing the occupation in which they are employed." *Id.* at 201, 65 S.Ct. at 231. The Court held that "[s]o long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft . . . without hostile discrimination, fairly, impartially, and in good faith." *Id.* at 204, 65 S.Ct. at 232.[2]

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[2] Although *Steele* was a Railway Labor Act case, the Supreme Court later held that the duty of fair representation applied equally to National Labor Relations Act cases. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 337, 73 S.Ct.

[814] As the duty-of-fair representation doctrine has evolved, its function as the protector of minority and individual employee rights, whether in collective bargaining or in the handling of grievances, has been emphasized consistently. *See Vaca*, 386 U.S. at 182, 87 S.Ct. at 912 ("the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against *individuals* stripped of traditional forms of redress by the provisions of federal labor law") (emphasis added); *Breininger*, 110 S. Ct. at 432 (the duty "is an essential means of enforcing fully the important principle that 'no *individual* union member may suffer invidious, hostile treatment at the hands of the majority of his [or her] coworkers'" (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971))) (emphasis added); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164 n.14, 103 S.Ct. 2281, 2290 n.14, 76 L.Ed.2d 476 (1983) (the duty exists to ensure that "*individual* employees are not . . . deprived of all effective means of protecting their own interests") (emphasis added); *Foust II*, 442 U.S. at 46-47, 99 S.Ct. at 2124-25; *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564, 96 S.Ct. 1048, 1056, 47 L.Ed.2d 231 (1976).

Unlike these Supreme Court cases and unlike *Foust I*, the injured party here is not an individual or group singled out for treatment different from that accorded the majority, but the entire class of Aztech employees represented by the Union.[3]

681, 685, 97 L.Ed. 1048 (1953); *see also Vaca*, 386 U.S. at 177, 87 S.Ct. at 909; *Foust II*, 442 U.S. at 46 n.8, 99 S.Ct. at 2124 n.8. *Foust I* also arose under the Railway Labor Act.

[3] Le'Mon observes that the Union and an El Paso, Texas, firm with considerably more Union-represented employees had entered into a collective bargaining agreement containing a "most-favored-nations" clause which provided that "there shall not be a more favorable contract offered to any competitor of the employer in the jurisdiction of Sheet Metal Local No. 49." Rec., vol. II, C.P. ex. 1, art. XX. Le'Mon then argues, inconsistently, that this El Paso contract induced the Union to strike to get wages comparable to those in the El Paso firm, *and* to file a late notice in order to make the strike illegal. The ALJ found

This, then, is not a situation in which a minority would be deprived of any remedy were it not for the duty of fair representation. Here, the Aztech employees had a remedy against the Union for the harm caused by the Union's negligence and they used that remedy: they petitioned for an election to oust the Union as the exclusive bargaining representative. This powerful remedy of ouster, available to the employees by virtue of their majority status, ensures that a union will have the proper incentives to represent the employees "without hostile discrimination, fairly, impartially, and in good faith." *Steele*, 323 U.S. at 204, 65 S.Ct. at 232.

Despite the availability of the ouster remedy, Le'Mon nevertheless urges us to view the duty of fair representation as one which creates a kind of fiduciary obligation owed by the Union to *all* those it represents. The Supreme Court, however,

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that the El Paso contract was not "a legitimate consideration here" since Albuquerque and El Paso are a distant 270 miles apart, too far to be a factor to the Union. Rec., vol. III, doc. 1, at 12 n.8. The ALJ also noted that if the Union's object was to abandon the Aztech employees to save the El Paso contract, it did not need the excuse of an untimely notice.

Because we conclude there is sufficient evidence to support the ALJ's factual conclusions, we need not address whether the entire group of Aztech employees constituted a discriminated-against minority vis-a-vis the El Paso majority.

has never conceived of the duty of fair representation in such a broad way.[4] To the [815]contrary, the courts' role in assessing union actions in duty-of-fair-representation cases is generally analogized to the "special scrutiny" courts must apply when analyzing legislative actions under the Equal Protection Clause. As the Supreme Court noted in *Steele*:

> "[T]he Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those

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[4] In a recent case involving the right to a jury trial in duty-of-fair-representation cases, Justice Marshall, writing for four members of the Supreme Court, stated that "[j]ust as a trustee must act in the best interest of the beneficiaries, a union, as the exclusive representative of the workers, must exercise its power to act on behalf of the employees in good faith." *Chauffers, Teamsters & Helpers, Local No. 391 v. Terry*, ___ U.S. ___, 110 S.Ct. 1339, 1346, 108 L.Ed.2d 519 (1990) (citation omitted). Justice Marshall reasoned that "just as a beneficiary does not directly control the actions of a trustee, an *individual* employee lacks direct control over a union's actions taken on his [or her] behalf." *Id.* (citation omitted) (emphasis added). Justice Kennedy, writing for two other justices, also found the trust analogy helpful in assessing the right to a jury trial, but he was careful to limit the breadth of this analogy and to emphasize that he did not which to "imply that a union acts as a trustee in all instances or that trust law, as a general matter, should inform any particular aspects of federal labor law." *Id.* 110 S.Ct. at 1357.

This case of course is factually distinct from the situation which prompted Justice Marshall to draw the trust analogy. Although an individual employee may share many of the same characteristics as a relatively powerless beneficiary, a majority of represented employees, with the power to decertify a union, has little in common with the traits Justice Marshall ascribed to a trust beneficiary. Therefore, while some members of the Supreme Court would impose a kind of fiduciary duty on a union vis-a-vis individual employees, no justice has suggested a broader duty with respect to *all* of the represented class of employees.

> possessed by a legislative body . . . but it has also imposed on the representative a corresponding duty."

Id. at 202, 65 S.Ct. at 232; *see also* Gorman, *Labor Law* at 716 ("the democratic process within the union has induced . . . courts to accord special scrutiny to decisions which worsen the job status of workers whose only common characteristic—while not as invidious as their color, sex, or national origin—is their minority status within the union"); Harper & Lupu, *Fair Representation as Equal Protection*, 98 Harv. L. Rev. 1211 (1985); ALJ Opinion, rec., vol. III, doc. 1, at 7 ("the [union-employee] relationship requires only that the statutory representative provide equal protection to the employees it represents").

For these reasons, the Sixth Circuit has declined "to extend the duty [of fair representation] to cover a situation . . . where a member or group was not singled out for different treatment." *NLRB v. Local 299, Int'l Bhd. of Teamsters*, 782 F.2d 46, 51 (6th Cir. 1986). The alleged breach of duty in *Local 299* included the union's failure to inform the employees that the company viewed them as engaging in an illegal work stoppage in violation of the contract. The court specifically rejected the argument that a fiduciary duty between a union and all its represented employees existed, and it held that "the duty of fair representation is implicated only when an individual or group is treated differently . . . than another individual, group or the collective." *Id.* at 51-52.

Because the concerns which prompted the Supreme Court to develop a duty of fair representation are not present in this case, we decline to extend the duty to situations in which the injury suffered is common to the majority of represented employees. Holding as we do that the union's duty of fair representation was not implicated in this case, we need not address the other contentions raised by Le'Mon.

The order of the NLRB is affirmed.

APPENDIX E

DECISION AND ORDER
OF THE
NATIONAL LABOR RELATIONS BOARD
AND ADMINISTRATIVE LAW JUDGE'S DECISION

September 30, 1988

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291 NLRB No. 41

D—9165
Albuquerque, NM

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 49, AFL—CIO (Aztech International, Ltd.)

and

Case 28—CB—2479

PETE LE'MON, an Individual

DECISION AND ORDER

On March 4, 1987, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent did not breach its duty of fair representation to the employees involved by failing to give timely Section 8(d)(3) notice to the Federal Mediation and Conciliation Service and any appropriate state agency or by

encouraging employees to continue striking after October 2, 1985.[1] Like the judge, we find that the Respondent's deficiencies in representing the employees amounted to no more than mere negligence.[2]

The difference between the majority and dissenting positions here is a narrow one. Our dissenting colleague states a willingness to accept as simple negligence the Respondent's failure to coordinate timing of the notice and commencement of the strike, but would base a violation of the duty of fair representation on the Respondent's conduct after October 2. Our difference, then, is limited to how we evaluate the Respondent's conduct after October 2.

By October 2, the Employer had delivered to the strikers letters stating that the strike was illegal because proper notice had not been given to the Federal Mediation and Conciliation Service and declaring that the strikers' employment was terminated and that they could apply for jobs as new employees.[3] Some strikers asked the Respondent's business agents about the letter, and the agents replied that it was company "rhetoric" or a company "ploy," and urged the strikers to "stick together." In making this response, without further investigating the situation or obtaining the advice of the Respondent's attorneys, the agents

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[1] Notice was received by the Federal Mediation and Conciliation Service on September 17, 1985. The strike commenced October 1, 1985. All subsequent dates are in 1985.

[2] There is no showing that the Respondent was hostile toward the employees at Aztech or acted in bad faith in representing them. In this regard, we agree with the judge's rejection of the Charging Party's implied bad-faith argument based on the "most favored nations clause."

[3] Among other things the letter stated, "If you wish to be considered for such employment, please come in and fill out an application. As with all new employees, you will need to go through our normal pre-employment interview, physical and drug/alcohol screening."

may have acted negligently, but their conduct was not so lacking of a rational or logical basis as to be arbitrary.

In meeting the employees' questions, the agents assessed events from a practical point of view. As they saw it, loss of employment is a risk in any strike, and employees' best protection is to stick together. They considered the Employer's statement that the strikers' employment was terminated as a tactical maneuver designed to break the strike. The Board has recognized that employers use the tactical discharge as a method of dissuading employees from striking without intending to refuse to reinstate employees when they request it. *Crookston Times Printing Co.*, 125 NLRB 304, 317 (1959). See also *Woodlawn Hospital*, 233 NLRB 782, 788 (1977).

The agents were not lawyers and did not seem to understand the effect that the failure to give proper 8(d) notice had on the strikers' status as employees.[4] Nor did they appear to appreciate the distinction between terminating strikers' employment and replacing strikers. Misunderstanding of this critical distinction, significant in labor law, is not uncommon among employees, their representatives, or management personnel. See *Eagle Comtronics*, 263 NLRB 515 (1982); *L.A. Water Treatment*, 286 NLRB No. 88 (Nov. 12, 1987); *Dayton Food Fair Stores v. NLRB*, 399 F.2d 153 (6th Cir. 1968).

Confronted with the Employer's statement that the strikers' employment was terminated, the agents advised the employees to continue to act together in an effort to return all employees to their jobs and to obtain a bargaining agreement. Within the limits of their competence and experience, the agents judged economic pressure to be the most effective strategy to deal with

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[4] In part, Sec. 8(d) provides: "Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act . . . ."

the situation. We do not consider that judgment to be in reckless disregard of the Union's statutory duties to unit employees.[5] Indeed, even if the agents had understood that the strikers lost status as employees of the Employer by operation of statute or had in fact been permanently discharged by the Employer, there was little they could do to benefit the employees at that point. The employees could only apply for jobs as new employees, hope to meet the Employer's interview requirements, and see whether the Employer would reemploy them. It was not unreasonable for the agents to assume that collective action in seeking reemployment would be more effective than individual action.

Moreover, as the judge points out, the employees were free to accept the Union's advice or the Employer's advice. There is no evidence that the Respondent, by threat of fine or other retaliation, coerced the employees to continue collective action. The employees could have decided to abandon the strike or to apply individually for employment, a decision employees are customarily faced with during a strike. They could have implemented their decision on their own initiative, unrestricted by formalities within the Respondent's control. Indeed, the record reveals that many employees did abandon the strike. See *Office Employees Local 2 (Janet Eichelberger)*, 268 NLRB 1353 (1984), enfd. 765 F.2d 851 (9th Cir. 1985).

The representation that the Respondent provided the employees in this case may not meet the standards of competence and caution that the Board would like to see observed. It does not, however, violate Section 8(b)(1)(A). A breach of duty of fair representation occurs only when the representative's conduct is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171 190 (1967). We do not consider the conduct here to have been arbitrary, and the Respondent's deficiency in represen-

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[5] We assume, arguendo, that a union that takes action in "reckless disregard" of its statutory duties to unit employees violates its duty of fair representation.

tation is a matter for employees to consider in selecting and supporting their representative, not a matter correctable under Section 8(b)(1)(A) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and dismisses the complaint.

Dated, Washington, D.C. September 30, 1988

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN STEPHENS, dissenting.

The duty of fair representation issue posed in this case involves the arbitrariness prong of the three-part standard formulated by the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (breach occurs "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith"). There is no claim that the Union's actions here were discriminatory, nor do I see this as a case involving bad faith. "Arbitrariness" has been the most difficult and vexing of the duty of fair representation inquiries.[1] I do not dispute the judge's reading of Board law as requiring a showing of more than mere negligence to warrant a finding that a union has acted arbitrarily so as to breach its duty of fair representation in violation of Section 8(b)(1)(A) of the Act. That is clearly the holding of cases that are still good law. *Teamsters Local 692 (Great Western Unifreight)*, 209 NLRB 446, 447—448 (1974). Accord: *Rainey Security Agency*, 274 NLRB 269 (1985); *Teamsters Local 282 (Transit-Mix Concrete Corp.)*, 267 NLRB 1130 (1983), enfd. 740 F.2d 141 (2d Cir. 1984). There is not much guidance in our cases as to what that "more" necessarily consists of; but it makes sense to me to hold a union guilty of breaching the duty when it has erred in failing to perform some ministerial or procedural act and, with notice of that error and of the possibility that it may seriously injure rights of bargaining unit employees, the union has persisted in a course of action or inaction that compounds injury or makes it impossible to cure. Such conduct goes beyond negligence to reckless disregard.[2] In

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[1] See *Robesky v. Qantas Empire Airways*, 573 F.2d 1082 (9th Cir. 1978) (Kennedy, J. concurring) (no adequate guidance in law of torts or Federal common law of labor relations for construing this term).

[2] A standard formulated by the Ninth Circuit in connection with cases involving unions' handling of grievances reflects similar considerations. In a series of cases, that circuit seems to have concluded that the negligent failure to perform a ministerial act amounts to arbitrariness in breach of the duty of fair

my view, that occurred here by virtue of the union agents' response to information they had received by at least October 2, 1985, the second day of the unlawful strike.[3]

I am willing to accept the proposition that a union's failure to coordinate the filing of a Section 8(d)(3) notice with the actual date on which the strike commences may constitute simple negligence not giving rise to actionable breach of the duty of fair representation, even where the error results in employees' being made vulnerable to discharge through participation in an unlawful strike. On the record here, however, I would find that the Union's business agents, Gary Briggs and George Gilliland, behaved in a manner that went beyond mere negligence to reckless disregard of the harm to the employees through actions that they took after they were put on notice of the clear possibility that the strike notice had not been timely given and that the Employer was taking action against the employees because of this.

It is undisputed that the strike notice was mailed to the Federal Mediation and Conciliation Service on September 17, 1985, and that therefore the strike called by the Union on September 30 and commenced on October 1 was plainly unlawful because it occurred less than 30 days after notice was given to the FMCS. The judge also found—and the finding is not disputed—that by October 2 Briggs and Gilliland knew that the Employer had sent letters to the strikers telling them that they

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representation when there is no "judgment" factor involved in deciding whether to perform the act in question and "no rational and proper basis" for the union's conduct and the employee's right to pursue a claim representing a "strong individual interest" is completely extinguished by the union's conduct. *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985), citing *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir. 1983), and *Eichelberger v. NLRB*, 765 F.2d 851, 855 (9th Cir. 1985).

[3] All dates are in 1985.

were terminated because they were engaging in a strike that was unlawful because of failure to give timely notice to the FMCS. The letter also informed the strikers that employment applications were being accepted for their jobs and they could fill out applications for positions as new employees.

Briggs then called the law firm that represented the Union; and, after learning that the attorney responsible for sending out the notice was out of town, he made no further effort to check out the timing of the notice. Instead, he encouraged employees to remain on strike, mistakenly advising them—according to his own testimony—that there was really no distinction between replacement and discharge and that they should just hang together. Union Agent Gilliland admitted that he had been "in the dark" about the legality of the strike, but nonetheless admitted telling employees who asked about their termination letters that this was just "some of the Company's rhetoric."[4]

Because I would find a breach of the duty of fair representation as of October 2, when Briggs and Gilliland affirmatively misled inquiring employees about the status of their strike, I

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[4] While I recognize that Briggs and Gilliland are not lawyers and I therefore would not find a breach of the duty of fair representation simply on the basis of their inability to give correct legal advice, I find a breach of the duty here because they falsely gave the impression that they knew there was no difference between replacement and discharge and that the Employer's claim that the strike was unlawful was just "rhetoric." This would be a different case if the employees had been told that the union agents did not know whether there was any truth to the Employer's claims concerning the strike's legality but that they advised staying out on strike as a tactical matter.

would issue a cease-and-desist order and would also hold the Union liable for any losses suffered from employees' delay, until October 7, in offering to return.[5]

Dated, Washington D.C. September 30, 1988

James M. Stephens, Chairman

NATIONAL LABOR RELATIONS BOARD

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[5] It is not clear when strikers were rehired, although the record shows that at least one of them was not hired back until December 20. In compliance, it could be determined on what dates the Employers hired replacements and, thus, what effect the delay in offering to return likely had on the strikers' ability to return to work.

JD(SF)—21—87
Albuquerque, NM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 49, AFL-CIO (Aztech International, Ltd.)

and Case 28—CB—2479

PETE LE'MON, an Individual

Lewis S. Harris, Albuquerque, NM,
for the General Counsel.
Dan A. McKinnon III, of *Marron, McKinnon & Ewing*,
Albuquerque, NM, for the Charging Party.
Gerald R. Bloomfield of *Kool, Kool, Bloomfield & Hollis*, Albuquerque, NM, for Respondent.

DECISION

JAMES M. KENNEDY, Administrative Law Judge: This case was tried before me in Albuquerque, New Mexico, on October 21, 1986.[1] The complaint is based upon a charge filed

[1] Although no party has filed a motion to correct the transcript, any reviewer of the transcript should be wary for it contains numerous errors, omissions, and misidentifications. By way of illustration, the caption appearing

by Pete Le'Mon, an Individual, on October 28, 1985.[2] The complaint alleges that Sheet Metal Workers' International Association, Local Union No. 49, AFL-CIO (herein called Respondent) has engaged in certain violations of Section 8(b)(1)(A) of the National Labor Relations Act, as amended (herein called the Act).

Issue

The principal issue is whether Respondent breached its duty of fair representation under Section 8(b)(1)(A) when it failed to give the Federal Mediation and Conciliation Service 30 days notice of the existence of a labor dispute, thereby subjecting the employees it represented to loss of employee status as defined by Section 2(3) of the Act. More specifically, the case presents the question of whether Respondent is financially liable for wages lost by those employees when Aztech International, Ltd. discharged them for striking when Respondent failed to meet the notice filing requirement of Section 8(d)(3) of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. All parties have filed briefs and they have been carefully considered. Based upon the entire record, as well as my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

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in the transcript volume is incorrect, labeling Charging Party Pete Le'Mon as Respondent, and Respondent Sheet Metal Workers' Local 49 as the Charging Party. It also omits entirely the appearance of Mr. Harris, Counsel for the General Counsel and misidentifies the Charging Party's attorney, Mr. McKinnon, as representing Respondent. Likewise, it lists Respondent's attorney, Mr. Bloomfield, as representing the Charging Party.

[2] All dates are 1985 unless otherwise noted.

I. Interstate Commerce

Respondent admits the Employer, Aztech International, Ltd., is a New Mexico corporation headquartered in Albuquerque where it manufactures and markets heating panels and evaporative cooler units. It further admits that during the 12-month period preceding the issuance of the complaint that Aztech, in the course of its business operations, sold goods valued in excess of $50,000 which were transported directly to customers located outside New Mexico. It further admits that Aztech is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

Respondent admits it is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

Fortunately, given sometimes inaccurate nature of the transcript, the facts in this case are not in significant dispute. Respondent has represented Aztech's production employees for at least 15 years through a series of collective-bargaining contracts. The most recent agreement expired on September 30. Efforts to negotiate a successor agreement had begun several months before, but by September 30 a new one had not been reached.

Earlier on September 11, Respondent's attorney, Bloomfield, had sent a notice of the existence of a labor dispute to the Regional Office of the Federal Mediation and Conciliation Service in San Francisco. That letter was not received by the Service until September 17, only 13 days before the contract was to expire.

Section 8(d)(3) of the Act requires that such a notification be within 30 days of the termination or modification of the

contract in question. Section 8(d) further says in the event that any employee engages in a strike within any notice period specified in Section 8(d) he or she shall lose status as an employee for the purpose of obtaining protection under Sections 8, 9 and 10 of the Act.[3] The credible evidence demonstrates that neither Gary Briggs, Respondent's business manager, or George "Jeep" Gilliland, its business representative, were actually aware of the tardy notice.

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[3] In pertinent part Section 8(d) of the Act reads as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
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> * * * * * *
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute. . .
>
> * * *
>
> . . . Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

As early as April, business representative Gilliland began holding monthly meetings with the Aztech employees, first to learn what the employees wanted in the new contract and later to inform them of the progress of negotiations. On July 30, 60 days before the contract was to expire, Gilliland, both to test the employees' resolve and to send a signal of solidarity to the employer, conducted a vote to give the Union authority to strike in the event that became necessary. Gilliland recalls that those employees who voted, voted unanimously to authorize a strike. There were, he says, two or three abstentions.

An additional meeting was held in August and two in September as the contract expiration date approached. The first was on September 26 and the last on September 30. The September 30 meeting was, in essence, a split meeting designed to accommodate the employees on the two shifts.

Based upon an amalgamation of the testimony, it appears that at the September 30 meetings Briggs presented the Company's last contract offer. He said he was displeased with it in several respects. First, it did not contain a ban on subcontracting and, in his opinion, permitted the Employer to subcontract unit work even to the extent of getting rid of all unit employees while still claiming that Company products were union-made. Second, it contained a random drug-testing clause and, third, the wage offer was inadequate, containing no increases and only an opportunity for a bonus at the end of the first year. He told the employees that for the past 15 years or so he had heard their complaints about wages and about the manner in which the Company had treated them. He also told them that they could accept the offer but if they did he did not want to hear any further complaints about inadequate contract protection. He also told them if they rejected the contract their other choice was to strike. It does not appear that he offered them the middle ground of not striking but continuing to negotiate. In his judgment, such a middle ground would have been impractical, given the status of the negotiations. Briggs told the employees

that if they struck there were some risks involved. These included being replaced or being fired.

At least one employee asked Briggs if he would sign the contract as it had been proposed. According to the employee's testimony Briggs equivocated, finally saying he could not live with a contract like the one the Employer was offering. As a result of Briggs' answer, some employees testified that Briggs was exhorting them to strike. Indeed, it appears that some picket signs had already been made. Even so, I am not convinced that Briggs was making any special effort to exhort them to strike, though it is clear that he disliked the Company's proposal.

In any event the employees were asked to vote to accept or reject the contract proposed by the Employer. At each meeting the secret ballot showed that the employees voted to reject it. As a result, in the early morning hours of Tuesday, October 1, Respondent established a picket line at Aztech's premises.

The strike lasted until the morning of Monday, October 7. It fell apart when the Employer discharged all the strikers, simultaneously filing Section 8(b)(3) charges against Respondent for having failed to comply with the Section 8(d)(3) notice requirements set forth in footnote 3, above. On October 1, the Employer had hand-delivered and/or mailed discharge letters to each of the striking employees. In the letter Aztech's president, Bennet King, stated:

> The strike in which you are participating is an illegal one because the Union failed to give proper notice to the Federal Mediation and Conciliation Service of the existence of a labor dispute so that the FMCS might have an opportunity to help us find solutions to the collective bargaining impasse. Because of this failure by the union, employees engaged in the strike are not protected by the National Labor Relations Act against firing. This letter will serve as formal notice of your

termination of employment by Aztech International, Ltd. effective immediately. . . .

Also on October 1, the Employer filed its Section 8(b)(3) charge against the Union. On October 4, the Regional Office of the Board issued a complaint against the Union alleging that the strike was unlawful.[4] The following day an article in the *Albuquerque Journal* newspaper noted the issuance of the complaint, together with a quotation from the NLRB Albuquerque Resident Officer asserting that the picketing was illegal.

The Employer's president, King, took several of the strikers, including the Charging Party, to his office where he reported the issuance of the complaint to them and showed them the newspaper article.

Before the newspaper article appeared Briggs and Gilliland had told those strikers who had asked about the assertions King had made in the discharge letter that they regarded King's letter as a company tactic, saying the Company was "playing with their heads." They urged the strikers to remain together if they intended to win the strike. After the newspaper article appeared Briggs and Gilliland continued to say the same thing.

It should be observed here, that although by October 2 Briggs and Gilliland were aware of the Company's contention that the strike was illegal, they did not believe it. Both Briggs and Gilliland believed that at worst, if the FMCS notice had not been given, the strike was unprotected. Thus, they surmised that the worst which could happen was that a court could enjoin the picketing. If that happened, they reasoned, the court could probably not make them go back to work. The discharges, which were by then a fait accompli, did not particularly concern them because, as Briggs had told the employees before, employers

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[4] See *Fort Smith Chair Co.*, 143 NLRB 514, 518-519 (1963).

often attempt to win strikes by replacing the strikers. To Briggs that is exactly what was happening here.

Briggs testified that when he learned of the Company's contention that the notices had not been filed, he had attempted to reach attorney Bloomfield but could not do so as he was out of town. Briggs spoke to another individual at Mr. Bloomfield's law firm but it is not clear whether he learned of the late filing with the FMCS. He testified he did not know if he had ever actually seen the letter which had been sent to the FMCS, saying that was within the province of the Union's lawyers. Based on Briggs' testimony I conclude that during the course of the strike, because of Mr. Bloomfield's absence, he was unable to find out whether the FMCS letter had been sent timely.

Despite his inability to find out from the law firm what had actually happened, Briggs, thinking as a traditional union official would, decided to "tough it out." He believed that whether the strike was legal or not, as long as the strikers could maintain solidarity there was a reasonably good chance that they could put enough economic pressure on the Company to prevail. Although the testimony is a little vague as to time and place, it appears that remarks of that nature were made to strikers Le'Mon, Limon, Padilla and Tucker.

Nonetheless, on the morning of October 7 it became apparent that most of the strikers were abandoning the strike. Upon seeing that, Briggs told the remaining strikers that the strike had been lost and that they should go back to work so as not to be left alone.

The record is not clear with respect to how many employees Aztech rehired or what the rate of rehire was. Some, who had not been replaced, were rehired immediately; others were hired later. All were rehired as new employees.

Subsequently, the employees, upset over the Union's handling of the strike, filed a decertification petition under

Section 9(c) of the Act seeking an election to oust the Union as their representative. Upon receipt of the decertification petition Respondent disclaimed interest in representing Aztech's production and maintenance employees.

IV. Analysis and Conclusions

The General Counsel asserts that Respondent's failure to file timely the 30-day notice of labor dispute with the FMCS as required by Section 8(d) followed by a strike within the 30-day period was a breach of a union duty, said to be fiduciary, which in turn amounts to a breach of the duty of fair representation and therefore an unfair labor practice within the meaning of Section 8(b)(1)(A). Respondent argues that the evidence shows only that it committed an error of negligent omission and that under the fair representation doctrine an act of negligence does not breach that duty. The threshhold question therefore is what is the appropriate level of care which Respondent must exercise to avoid liability under the doctrine? Is Respondent a fiduciary, thereby raising the level of care which must be taken by Section 9(a) representative or is Respondent something less than a fiduciary owing no duty other than one of fair play?

In the seminal case of *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 (1944), the Supreme Court in articulating the fair representation doctrine described the nature of a union's relationship to the individuals it represents as the exclusive statutory representative:

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both

> to create and restrict the rights of those whom it represents. . . .

Similarly, the Board has held that a union does not stand in a fiduciary relationship to the employees it represents. It has said, instead, that the relationship is analogous to that between the legislator and constituent. *Service Employees, Local 579 (Beverly Manor Convalescent Center)*, 229 NLRB 692, fn. 2 (1977). It appears therefore that Respondent's duty to the Aztech employees here was not a fiduciary one, for the Supreme Court and the Board have both held that the relationship requires only that the statutory representative provide equal protection to the employees it represents. This is not to say that the statutory representative cannot make reasonable choices in carrying out its function even though those choices may have incidental negative effects on some of its constituents. *Steele*, *supra*, at 203; cf. *Ford Motor Corp. v. Huffman*, 345 U.S. 330 (1953).

In *Steele* the Court went on to say that although a union's duty to the employees it represents is comparable to the duties of a legislative body, nonetheless the statutory grant of the exclusive right to represent the employees "impose[s] on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Steele*, *supra*, at 202-203.

The duty of fair representation was not initially considered by the Board to be an unfair labor practice, but in *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2nd. Cir. 1963), the Board concluded that the fair representation doctrine was subsumed under Section 8(b)(1)(A) of the Act. There it stated:[5]

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[5] 140 NLRB 181, 185.

> . . . [W]e are of the opinion that Section 7 [of the Act] thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair. [Footnote omitted.]

Although the Second Circuit would not enforce the Board's theory that a failure to meet the duty of fair representation was an unfair labor practice within the meaning of Section 8(b)(1)(A), the Supreme Court disagreed in *Vaca v. Sipes*, 386 U.S. 171 (1967). After reaching that conclusion, the Court stated:

> A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. See *Humphrey v. Moore*, [375 U.S. 335 (1964)]; *Ford Motor Co. v. Huffman*, [*supra*]. (*Vaca v. Sipes*, *supra* at 190.)

The Court, noting that the *Vaca* case arose in a context involving the manner in which a union processed the plaintiff's grievance, added that it accepted the proposition that a union may not arbitrarily ignore meritorious grievance or process it in a *perfunctory* fashion. (Emphasis supplied.)

As a result of *Vaca* the duty of fair representation is now often described as one in which a union may not act arbitrarily, invidiously, irrelevantly, unfairly or perfunctorily in carrying out its representational duties. The *Vaca* court even recognized that those phrases had become cause for debate with respect to the scope of their meaning. It had hoped to be able to provide clarity with respect to defining those phrases. Despite that effort,

the duty itself remains somewhat murky depending on the fact pattern being presented. The Board has generally held that duty of fair representation is not breached where the union is forgetful, commits an inadvertent error, or is negligent. *Local 18, Operating Engineers (Ohio Pipeline Construction Co.*, 144 NLRB 1364 (1963); *Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446 (1974).

Yet the courts have had some difficulty in determining the breach of the duty where errors, omissions and negligence caused results which severely damaged an employee's rights, privileges or status. For example, the Ninth Circuit in *Dutrisiac v. Caterpillar Tractor*, 349 F.2d 1270 (1983) was faced with a situation where a union missed a deadline for filing a grievance. The court found that meeting a deadline for the filing of a grievance was simply a ministerial act and easy to carry out. It appeared to recognize that the failure to file was simply an act of negligence but observed that the grievant's interests which were at stake were strong and that the union's omission totally extinguished the grievant's right to pursue his case. In that circumstance the court held that it was a breach of the duty of fair representation to fail to complete the ministerial act of filing a grievance in a timely way. Despite some language of the majority claiming that it was not finding a breach of the duty for simple negligence, Judge Norris disagreed in his concurring opinion. Given the facts of the case, it appears to me that Judge Norris is correct in his assessment that the court relied on simple negligence to find a breach of the duty.[6] Nonetheless, the Ninth Circuit's analysis has some analytical impact here. It is quite true that meeting a filing deadline is a ministerial act which can be easily met. It is equally true that a missed deadline can quite often result in great harm to an individual's rights or status. Indeed, it can be reasonably argued that the deadline which Respondent missed here is no different from the deadline which was missed in *Dutrisiac*. Yet,

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[6] Judge Norris was relying on comments made by Judge Anthony M. Kennedy in *Robesky v. Quantas Empire Airways*, 573 F.2d 1082 (9th Cir. 1978).

can it be said in either case that the failure to file was arbitrary, discriminatory, invidious, irrelevant or perfunctory? It is hard to characterize forgetfulness or mistake as any of those although the *Dutrisiac* court appears to have done so.

Earlier, the Ninth Circuit had stated in *Robesky v. Qantas Empire Airways*, 573 F.2d 1082, 1092 (1978) in a grievance-handling context that the union's failure to disclose fully the conditions of a settlement proposal, even though unintentional, had nonetheless been so reckless that the union could not be shielded from liability under the fair representation doctrine. It said the omission was "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary," citing *Ruzicka v. General Motors*, 523 F.2d 306 (6th Cir. 1975). *Ruzicka* was another case in which the union failed timely to file a grievance and held that the failure amounted to arbitrary and perfunctory handling of the grievance sufficient to invoke the doctrine.

Despite its language in *Ruzicka*, the Sixth Circuit has recently begun to reanalyze the utility of the *Vaca/Miranda Fuel* tests finding them to be unclear. See *NLRB v. Teamsters Local 299 (McLean Trucking Co.)*, 782 F.2d 46, 121 LRRM 2478, 2482 (1986). That case has some striking similarities to the case before me and is one in which the Board found a violation. Indeed, the General Counsel argues that the underlying Board case, *Teamsters Local 299 (McLean Trucking Co.)*, 270 NLRB 1250 (1984) controls here even though the Sixth Circuit denied enforcement. At the risk of over-distilling the facts, *McLean* involved a company whose collective-bargaining contract contained a modified no-strike clause. When a dispute arose with respect to the layoff of a small group of employees, the union demanded, over the protest of the company, to hold a meeting on the company premises during worktime. The employer asserted to the union officials that the meeting was a breach of the no-strike clause, and that the employees could be disciplined. The union nonetheless conducted the meeting, never telling the employees that the company regarded it as an illegal work stoppage or that

the Company could discipline them. The employer, upon pursuing the matter, determined that the meeting was not an exception to the no-strike clause, and subsequently disciplined the employees in accordance with the terms set forth in the contract.

The Board held the union in *McLean* breached the duty of fair representation when it encouraged the employees to stop work in violation of the no-strike clause and when it exposed them to discipline, a risk it had failed to explain. The Board held that the union's claim that the work stoppage was only a meeting was not a good faith position and that the union had deliberately misled the employees with respect to the consequences of their action. It held that the employees "had a right to expect that the Union would not encourage them to violate the contract in a way that would expose them to a loss of income or even employment." Specifically, it relied on both *Miranda* and *Vaca* in reaching its conclusion that the Union's contract was arbitrary. 270 NLRB 1250, 1252.

The Sixth Circuit, however, regarded the Board's decision as an assertion that the duty of fair representation "imposes an affirmative obligation on a union to inform its members of possible disciplinary consequences for participating in at least some forms of union activity." It then said that after careful review of the case law it believed that there was no support for interpreting the duty of fair representation to encompass the fact pattern before it. It noted that both *Vaca* and *Ruzicka* involved the arbitrary handling of an individual's grievance. It observed that even though the individuals in those cases had not been discriminated against in the classic sense and even if the Union had not acted in bad faith, the grievants were alleging treatment disparate from other members. It stated that the Board's position with respect to the application of the *Vaca* logic was "completely out of context" and

> . . . [w]ould require us to extend the duty [of fair representation] to cover a situation involving a work stoppage rather than collective bargaining or grievance

> processing, and where a member or group was not singled out for different treatment. In other words, the duty would be expanded to include an undefined fiduciary duty which a union owes to its unit as a whole. Such a duty could impose on a union an obligation to authorize a strike, or any number of other affirmative actions. We decline to extend the duty so far, since we believe the duty of fair representation was never intended to be "catch-all" for undesirable union activity. * * * We conclude as a matter of law, that the duty of fair representation is implicated only when an individual or group is treated differently by a union—either through discriminatory, bad-faith, or arbitrary conduct—than another individual, group or the collective. Since such differential treatment was not alleged in this case, we find that the Board was incorrect as a matter of law to find a violation of the duty of fair representation. We therefore decline to consider the *Miranda Fuel* question, and cannot grant enforcement on this basis.

Thus, both the Ninth and the Sixth Circuits have questioned the utility of the *Miranda/Vaca* language and have now come down on different sides of the issue. The Ninth Circuit is willing to say that negligence in some circumstances is a perfunctory act; the Sixth Circuit has said that even a deliberate, apparently reckless, act resulting in the destruction or impairment of employee rights or status is not a breach of the duty so long as the employee is not treated differently than others and even then only if the union's conduct is discriminatory, arbitrary or in bad faith.

The foregoing discussion does not resolve the specific fact pattern before me. I advert to it, however, with the specific purpose of observing that fair representation cases of the kind presented here are not straightforward. Indeed, both courts have strongly suggested that the *Miranda/Vaca* language is not of bright-line assistance in determining this kind of case. The Sixth Circuit in *McLean* even goes so far as to say that language arising

from grievance-handling cases with respect to what a union must do to inform its members of the consequences of their acts in other fact patterns is inappropriate. The Board, of course, had held the opposite.

In the instant case the Union did not inform the Aztech employees that the Section 8(d) notice to the FMCS had not been timely filed principally because its officials did not know it. I should observe here that there is a significant factual difference between Respondent's omission here and the Teamsters' omission in *McLean*. In *McLean* the union knew it was risking a breach of the no-strike clause. Indeed as the meeting began the employer informed the union that it was breaching that section of the contract. Aztech's King did not make a similar warning and I credit the Union's evidence that it took several days to find out what had actually happened with respect to the FMCS filing. In the meantime, of course, the Employer had already taken the disciplinary act which Section 8(d) permitted it to take. It can clearly be said that the Teamsters' act in *McLean* was taken knowingly and with reckless disregard for employee rights. The same cannot be said of Respondent's omission. Thus, the Board's decision in *McLean* is factually distinguishable from the case presented here, even without regard to the Sixth Circuit's decision to deny enforcement. I must disagree therefore with the General Counsel who urges that the Board's decision in *McLean* controls.

Instead, seems to me that the General Counsel has not shown that the Union's failure to file the FMCS notice was anything other than an act of negligence, mistake or inadvertence. Under Board law as set forth in *Local 18 Operating Engineers (Ohio Pipeline Construction Co.)*, *supra*, and *Teamsters Local 692 (Great Western Unifreight System)*, *supra*, no breach of the duty can be made out. The only two theories which I can see which would require a finding of a violation is either an adoption of the General Counsel's fiduciary duty theory or the Ninth Circuit's analysis with respect to a failure to perform a ministerial act. The fiduciary theory would of course impose a higher duty

of care upon the union than is normally seen in fair representation cases. I think it is fair to conclude that if the Union's duty is that of a fiduciary, it failed to meet it. However, I have already noted that the fiduciary duty does not exist here.[7] Moreover, the Board has not accepted the Ninth Circuit's approach here. In fact the Board has held ". . . it is not every act of disparate treatment or negligent conduct which is proscribed by Section 8(b)(1)(A), only those which have been motivated by hostile, invidious, irrelevant, or unfair considerations. . ." *Steelworkers Local 2869 (Kaiser Steel Corp.)*, 239 NLRB 982 (1978). Thus, while we may be offended by Respondent's failure to file the FMCS notice and its consequent negative impact upon the employment status of the individuals Respondent represented, it appears that under current Board law the Respondent did not breach the duty of fair representation when it called the strike.[8]

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[7] The Board has imposed a fiduciary obligation on unions in the enforcement of union security clauses. See *Conductron Corporation*, 183 NLRB 419, 429 (1970); *Rocket and Guided Missile Lodge 946, IAM (Aerojet-General Corp.)*, 186 NLRB 561, 562, (1970) and cases cited in fn. 1; *Boilermakers Local 732 (Triple A Machine Shop, Inc.*, 239 NLRB 504, (1978).

[8] The Charging Party has observed that Respondent was subject to a "most-favored-nations" clause in a contract with an El Paso, Texas firm. He argues that Respondent could not politically accept a lower rate in Albuquerque without risking wage cuts at the larger El Paso company. He says it follows, therefore, that Respondent specially exhorted Aztech's employees to strike to obtain the El Paso rate. Whether the employees won or lost, he argues, the Respondent was acting improperly. If the employees succeeded, Aztech, already financially precarious, would be rendered uncompetitive and forced out of business. If they failed and the strike was lost, Respondent would not be obligated to sign a new contract. Either way the El Paso contract would not be jeopardized.

I do not accept the premise. Respondent had a specific purpose in Albuquerque, to obtain a new contract with Aztech. El Paso is 270 miles distant and probably not much of a consideration to the Union as it sought a new contract in Albuquerque. More significant is the observation that even if Respondent was concerned with the most favored nations clause in El Paso, it did not need to file a late notice with the FMCS to create a dispute justifying the abandonment of the Aztech employees to save the El Paso contract. Any strike

Moreover, as it breached no duty of fair representation at the time of the calling of the strike and, as the employees were discharged almost instantly thereafter, it was faced with a fait accompli. The employees were free to either accept the Union's advice or the Employer's advice and to make their own decisions thereafter. Briggs' and Gilliland's statements to employees after the strike was under way that to win the strike they had to stick together was only the ordinary encouragement of a union official to maintain solidarity during a labor dispute. Such statements do not amount to any special encouragement to continue to strike in the face of an unreasonable risk. Therefore, I cannot find a violation based upon the General Counsel's second theory either, that a breach of the duty occurs when the Union fails to tell its employees to go back to work.

Indeed, it seems to me that the Aztech employees took the steps that one would expect them to take against a union which failed adequately to represent their interests. They fired the Union as their representative when they filed their decertification petition and induced the disclaimer of representation. That is certainly the most appropriate means of punishing a representative which has made such a horrendous error.

Based on the foregoing findings of fact and the record as a whole, I hereby issue the following:

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would have accomplished that. Therefore, I do not regard the El Paso most favored nations clause to be a legitimate consideration here. The Charging Party's position with respect to it is illogical.

Conclusions of Law

1. Aztech International, Ltd. is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent, Sheet Metal Workers' International Association, Local No. 49, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in no violations of the Act as alleged in the complaint.

Based upon the foregoing findings of fact and conclusions of law, I hereby issue the following recommended:[9]

ORDER

The complaint is dismissed in its entirety.

Dated: March 4, 1987

/s/
James M. Kennedy
Administrative Law Judge

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX F

COMPLAINT AND NOTICE OF HEARING

April 21, 1986

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 49, AFL-CIO (Aztech International, Ltd.)

and Case 28-CB-2479

PETE LE'MON, an Individual

COMPLAINT AND NOTICE OF HEARING

It having been charged by Pete Le'Mon, an individual (herein called Le'Mon), that Local 49, Sheet Metal Workers International Association, AFL-CIO (designated in the caption hereof by its correct name and herein called the Respondent), has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (hereinafter called the Board), by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge herein was filed by Le'Mon on October 28, 1985, and a copy thereof was served by certified mail upon the Respondent on the same date.

2. Aztech International, Ltd. (herein called Aztech), is now, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New Mexico.

3. At all times material herein, Aztech has maintained an office and principal place of business in Albuquerque, New Mexico, where it is engaged in the manufacture and marketing of heating panels and evaporative cooling units.

4. During the past 12-month period, which period is representative of its operations at all times material herein, Aztech, in the course of its business operations described above in paragraph 3, sold goods valued in excess of $50,000 which were transported in interstate commerce and delivered to customers outside the State of New Mexico.

5. Aztech is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(5) of the Act.

6. The Respondent is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

7. (a) At all times material herein, Gary Briggs has occupied the position of business manager of the Respondent, and is now, and has been at all times material herein, an agent of the Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act.

(b) At all times material herein, George "Jeep" Gilliland has occupied the position of business representative of the Respondent, and is now, and has been at all times material herein, an agent of the Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act.

8. At all times material herein, by virtue of Section 9(a) of the Act, the Respondent has been, and is now, the exclusive bargaining representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, of all employees of Aztech in the following unit:

> [A]ll production employees of [Aztech], excluding only supervisors, office clerical help, watchmen and guards as defined in the National Labor Relations Act of 1947, as amended.

9. At all times material herein, the Respondent and Aztech have maintained in effect and have enforced a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of the employees of Aztech in the unit described above in paragraph 8, which, by its terms, expired on September 30, 1985.

10. (a) On or about October 1, 1985, the Respondent engaged in a strike, and continued to engage in a strike, against Aztech until on or about October 7, 1985.

(b) The object of the strike described above in subparagraph 10(a) was in furtherance of the Respondent's reopening of the collective-bargaining agreement described above in paragraph 9, and the demand for a successor agreement to it.

(c) Commencing on or about October 1, 1985, and continuing to October 7, 1985, the Respondent, in the furtherance and support of its demands as described above in subparagraph 10(b), picketed at Aztech's Albuquerque, New Mexico, facility with picket signs stating "Aztech International, No Contract, SMWIA, Sheet Metal Workers, Local Union #49."

11. On or about September 17, 1985, the Respondent served a written notice on the Federal Mediation and Conciliation Service of the existence of a dispute between the Respondent and Aztech, as described above in subparagraphs 10(a) through 10(c).

12. The Respondent commenced the conduct as described above in paragraph 10, and its subparagraphs, less than 30 days after service of the notice described above in paragraph 11.

13. Since on or about September 30, 1985, the Respondent by its agents has failed to fairly represent employees of Aztech by the following acts and conduct:

(a) On or about September 30, 1985, the Respondent, through Gary Briggs, induced and encouraged employees to vote in favor of striking Aztech despite its knowledge that it had not complied with the 30-day time period required for notice of the existence of a dispute, as set forth in Section 8(d)(3) of the Act.

(b) On or about October 1, 1985, the Respondent, through George "Jeep" Gilliland, willfully encouraged employees to continue its strike of Aztech by affirmatively misrepresenting to employees that proper notice had been made in compliance with the provisions of Section 8(d)(3) of the Act.

(c) On or about October 2, 1985, and continuing through October 7, 1985, the Respondent, through Gary Briggs and George "Jeep" Gilliland, continued to encourage employees to participate in the strike against Aztech despite its knowledge that it had not complied with the provision of Section 8(d)(3) of the Act.

14. As a consequence of the Respondent's acts and conduct described above in paragraph 13, and its subparagraphs, certain striking employees of Aztech suffered loss of employment, wages, seniority rights, and other employment benefits.

15. By the acts and conduct described above in paragraph 13, and its subparagraphs, in connection with its representative status as described above in paragraphs 8 and 9, the Respondent has failed to represent the employees of Aztech by engaging in unfair, arbitrary, and invidious conduct, which conduct constitutes a breach of the fiduciary duty owed to employees whom it represents.

16. By the acts and conduct described above in paragraph 13, and its subparagraphs, and paragraph 15, and by each of said acts and conduct, the Respondent has restrained and coerced,

and is continuing to restrain and coerce, employees in the exercise of the rights guaranteed by Section 7 of the Act, and the Respondent thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

17. The acts and conduct of the Respondent described above in paragraphs 13, 15, and 16, occurring in connection with the operations of Aztech, described above in paragraphs 2 through 5, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

18. The acts and conduct of the Respondent described above constitute unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, which affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 13, 15, and 16, the General Counsel seeks an order providing that Respondent:

> Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply therewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices herein alleged.

PLEASE TAKE NOTICE that commencing at 9 a.m. (MDT), on May 20, 1986, and continuing on consecutive days thereafter until concluded, a hearing will be conducted in the Hearing Room, National Labor Relations Board, Patio Plaza Building, 5000 Marble Avenue NE, Albuquerque, New Mexico, before a duly designated administrative law judge of the Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned, acting in this matter as an agent of the Board, an original and four copies of an answer to said complaint within 10 days from the service thereof, and that, unless the Respondent does so, all of the allegations in the complaint shall be deemed to be true and shall be so found by the Board. You are also notified that, pursuant to said Rules and Regulations, the Respondent shall serve a copy of the answer on each of the other parties.

Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, as amended, is attached.

Dated at Phoenix, Arizona, this 21st day of April, 1986.

/s/
Roy H. Garner, Regional Director

APPENDIX G

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

§ 7 NLRA, 29 U.S.C. § 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 8(b)(1)(A) NLRA, 29 U.S.C. § 158(b)(1)(A)

(b) It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . . .

§ 8(d) NLRA, § 29 U.S.C. § 158(d)

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution

of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be

the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to, any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

§ 9(a) NLRA,
29 U.S.C. § 159(a)

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

APPENDIX H

APPELLANT'S PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC* FILED WITH THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

January 31, 1992

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETE LE'MON Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent,	No. 88–2833
SHEET METAL WORKERS INTER-NATIONAL ASSOCIATION LOCAL UNION NO. 49 AFL–CIO, Intervenor.	

ON REMAND FROM THE
UNITED STATES SUPREME COURT
(S. Ct. NO. 90–400)

ON PETITION FOR REVIEW FROM THE
NATIONAL LABOR RELATIONS BOARD
(NLRB No. 28–CB–2479)

APPELLANT'S PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

Hugh L. Reilly, Esq.
National Right to Work Legal
Defense Foundation, Inc.
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Springfield, VA 22160
(703) 321–8510

STATEMENT OF APPELLANT'S COUNSEL PURSUANT TO TENTH CIRCUIT RULE 35.2.2

Hugh L. Reilly, counsel for the appellant, Pete Le'Mon, pursuant to his right and obligation under Tenth Circuit Rule 35.2.2 states:

I express a belief (and the conviction) based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the United States Supreme Court,

> *Universal Camera v. NLRB*, 340 U.S. at 494 (1951); *Airline Pilots Association v. O'Neill*, ___ U.S. at ___, 111 S.Ct. at 1130, 1133, 1134, 1135, & 1137 (1991); and *United Steelworkers v. Rawson*, 495 U.S. at ___, 110 S.Ct. at 1911 (1990).

I also express a belief (and the conviction) based on a reasoned and studied professional judgment that this appeal involves the following five questions of exceptional importance.

1. Is there substantial evidence, under *Universal Camera*, to support a decision of the NLRB which fails to address *admissions* in the record which utterly destroy, or at least substantially undermine, the "factual" predicate for the Board's decision?

2. Is the failure of a labor organization which is "exclusive representative" under the National Labor Relations Act to file the strike notice mandated by §8(d) of the Act and a *per se* violation of the duty of fair representation?

3. Is the failure of a labor organization which is "exclusive representative" under the National Labor Relations Act to file the strike notice mandated by § 8(d) of the Act so far below the limit of acceptable fiduciary conduct as to be more than "mere negligence" and, therefore,

"gross negligence" or representation which is otherwise "inadequate"?

4. What criteria in law are to be employed to distinguish cases of "mere negligence," which *do not* result in labor organization culpability under the duty of fair representation and cases of "arbitrary conduct" which *do* result in labor organization culpability under the duty of fair representation?

5. What grounds allow a labor organization which is "exclusive representative" under the National Labor Relations Act to defend duty of fair representation cases in the Tenth Circuit by claiming its "ouster" as representative is sufficient remedy when that defense is not permitted in other Circuits under *Air Line Pilots Association v. O'Neill* ___ U.S. ___, 111 S. Ct. 1127 (1990)?

/s/ — Jan. 31, 1992

Hugh L. Reilly, attorney of record for Pete Le'Mon, appellant — date

[Table of Contents and Table of Authorities deleted in printing.]

APPELLANT'S PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The appellant, Pete Le'Mon (herein "Le'Mon" or "Appellant"), through counsel, pursuant to F. R. App.P. and Tenth Circuit Rules 35 and 40, petitions for panel rehearing with suggestion for rehearing *en banc* of the judgment entered in this case on remand from the United States Supreme Court on December 20, 1991.

STATEMENT OF FACTS

Le'Mon was employed by Aztech International, Inc. ("Aztech"), within a bargaining unit of employees represented by Sheet Metal Workers' International Association Local No. 49 ("SMW"). SMW was the exclusive representative of unit employees, including Le'Mon, under authority of § 9(a) of the National Labor Relations Act ("NLRA"),[1] for purposes of collective bargaining.

The Aztech/SMW collective bargaining agreement covering unit employees was due to expire on September 30, 1985. In the late Summer of 1985, SMW conducted a preliminary strike vote among the Aztech employees it represented. The membership authorized a strike to be conducted. On September 29, 1985, SMW had received Aztech's "final offer," and held a membership vote to accept or reject the bargaining agreement proposed by Aztech. The membership voted to reject Aztech's offer.

A strike ensued on October 1, and effectively ended on October 5, 1985, when employees learned through newspaper accounts or letters from Aztech that the strike was "illegal."

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[1] 29 U.S.C. § 159(a).

Thereafter, Aztech would only take the striking former employees back to employment as "new hires."[2]

SMW concedes that the strike was illegal, and that it had *not* filed with the Federal Mediation and Conciliation Service (FMCS) the strike notice mandated by § 8(d). The record before the Administrative Law Judge (ALJ) explicitly shows SMW's *admission* that "service of [the required] notice on the F[ederal] M[ediation] and C[onciliation] S[ervice] was given by lawyer (inaudible) September 11, 1985, which was received by the FMCS on September 17, 1985."[3] It shows SMW's *additional admission* that the notice "did *not* comply with the thirty–day time period required for notice of the existence of the dispute as set forth in Section [8(d)(3)] of the [NLRA]."[4] And the record contains SMW's *further admission* that "its conduct [of the strike] began in less than thirty days after service of the notice on FMCS."[5] As SMW's lawyer put it: "Yeah, well, obviously I'm stuck with the fact that we gave the notice on the 11th, it was received on the 17th by the Service, a strike commenced on October 1. Now, I'm not going to deny any of those facts . . . that's obvious."[6] The strike was begun more than two weeks before one was permitted under § 8(d) of the Act.

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[2] Violations of the notice provisions of § 8(d) of the NLRA, 29 U.S.C. § 158(d) ("§ 8(d) notice") results in "the Union [having] forfeited its status as the majority representative of the. . . employees, and the strikers lost their status as employees." *Oil Workers, Local 19*, 91 NLRB at 759 (1950) (*Oil Workers*). *Oil Workers* pertains to violations of the 60 day notice requirement in § 8(d)(1), but the same results follow from violations, as here, of the 30 day notice provision of § 8(d)(3). *Locomotive Firemen v. NLRB*, 302 F.2d 198 (9th Cir. 1962).

[3] Transcript of proceedings before the ALJ, October 21, 1986, ("Tr. ___") at 8.

[4] Tr. 9.

[5] *Id.*

[6] Tr. 17.

Even more fundamentally to panel and *en banc* consideration of the issues in this case in light of the Supreme Court's Order, the record below shows that SMW *never* advised the Aztech employees at membership meetings held in September of 1985 that the notice required by § 8(d) had *not* been timely filed. According to SMW records, meetings were held on September 18, 26, and 30.[7] The September 30, 1985 meeting was crucial, as it was held "[t]o accept or reject the contract."[8] Thus, in three meetings, including the vote on September 30, the employees were denied the vital piece of information that SMW had not timely filed the notice which was a mandatory precondition to a lawful strike. As the NLRB Administrative Law Judge (ALJ) so sensitively put it, despite the harsh decision described below, "I'm sorry that it caused such pain for the employees, who found themselves hooked by the language of Section 8–D, which deprived them of employment status."[9]

STATEMENT OF THE CASE

NLRB Proceedings

On October 29, 1985, Le'Mon filed charges with the NLRB's Regional Office in Phoenix. He alleged that the SMW violated § 8(b)(1)(A) of the NLRA[10] because, *inter alia*, it did not advise the Aztech employees it represented that SMW had not timely filed the § 8(d) notice. The Regional Director issued a complaint on those charges on April 21, 1986.

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[7] Tr. 243.

[8] Tr. 244.

[9] Tr. 255.

[10] 29 U.S.C. § 158 (b)(1)(A).

The NLRB affirmed an administrative law judge in a decision and order dated September 30, 1988.[11] The NLRB admonished that "[t]he representation that the [SMW] provided the employees in this case may not meet the standards of competence and caution that the Board would like to see observed."[12] Despite the fact that SMW failed to meet "the standards of competence and caution" the NLRB would otherwise have liked, the NLRB found no violation of § 8(b)(1)(A) because "[a] breach of the duty of fair representation occurs only when the representative's conduct is 'arbitrary, discriminatory, or in bad faith.'"[13] The NLRB did not "consider the conduct here to have been arbitrary[,]"[14] and concluded that the "deficiencies in representation amounted to no more than mere negligence."[15] As a caveat, the NLRB "assume[d] arguendo, that a union that takes action in 'reckless disregard' of its statutory duties to unit employees violates its duty of fair representation."[16]

Initial Panel Decision

Le'Mon filed his petition for review in this Circuit. On review, a panel of this Court eschewed the grounds for decision set forth by the NLRB.[17] Instead, the panel concluded that SMW did not violate the DFR because, in its view, the duty does not apply "to situations in which the injury suffered is common

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[11] *Sheet Metal Workers, Local 49 (Aztech International)*, 291 NLRB No. 41 (September 30, 1988) ("Board Decision").

[12] Board Decision at 4.

[13] Board Decision at 4–5.

[14] Board Decision at 5.

[15] Board Decision at 1–2.

[16] Board Decision at 4, n. 5.

[17] *Le'Mon v. NLRB*, 902 F.2d 810 (10th Cir. 1990) ("*Le'Mon* I").

to the majority of represented employees."[18] and because a "remedy" sufficient in law was available, as the terminated employees could "oust the Union as the exclusive bargaining representative."[19]

Decision Of The United States Supreme Court

Le'Mon timely filed a petition for certiorari to the United States Supreme Court. His petition was granted.[20] The Supreme Court's Order, in its entirety, states:

> March 25, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Air Line Pilots Association, International v. O'Neill*, 499 U.S. ___, 111 S.Ct. 1127, ___ L.Ed.2d ___ (1991) and *United Steelworkers of America, AFL–CIO–CLC v. Rawson*, 495 U.S. ___, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990).[21]

Panel Decision On Remand

Following remand, by order filed May 10, 1991, this Court vacated the judgment and mandate issued in *Le'Mon I*, and requested that the parties submit memorandum briefs "addressing the effect of [the Supreme Court's Order granting certiorari] on

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[18] *Id.* at 815.

[19] *Id.* at 814. The panel never explained exactly how the ouster remedy restores the terminated employees' jobs or compensates them for lost earnings and benefits derived from earnings.

[20] *Le'Mon v. NLRB*, ___ U.S. ___, 111 S.Ct. 1383 (1991).

[21] Respectively subsequent references to these Supreme Court precedents will be "*O'Neill*", 111 S. Ct. at ___", and "*Rawson*, 110 S. Ct. at ___."

this petition for review." The parties accordingly submitted briefs addressed to that issue. A panel of the Court issued a decision, dated December 20, 1991.[22]

The panel on remand affirmed the result in *Le'Mon I* "albeit on grounds different from those underlying [its] decision in *Le'Mon I*."[23] The panel characterized *Le'Mon I* as holding that "the duty of fair representation [does] not apply to cases where a union's negligent conduct affected *all* its members.'"[24] Contrasting *Le'Mon I*, the panel concluded that "*O'Neill* holds, however, that the judicially created duty of fair representation applies to 'all union activity, 111 S.Ct. at 1130, thereby invalidating our prior analysis." Le'Mon agrees with the panel that *O'Neill* invalidates the analysis in *Le'Mon I*, but respectfully submits that it is not because of any contrast between the application of the DFR to "all [the union's] members" as opposed to "all [the union's] activities." Instead, it is because *O'Neill* holds: "just as [other] fiduciaries owe their beneficiaries a duty of care, as well as a duty of loyalty, *a union owes [all represented employees] a duty to represent them adequately*, as well as honestly and in good faith."[25]

The panel forthrightly acknowledges that: "In *O'Neill*, the [Supreme] Court *squarely rejected an argument that 'a union need owe no enforceable duty of adequate representation because employees are protected from inadequate representation by the union political process.*'"[26] Despite recognition of the Supreme

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[22] *Le'Mon v. NLRB*, ___ F.2d ___ (10th Cir. December 20, 1991) ("*Le'Mon II*"). Herein, page references to the panel decision on remand from the Supreme Court will be to the slip opinion and designated "Slip. Op. ___."

[23] Slip. Op. at 3.

[24] *Id.*

[25] *O'Neill*, 111 S.Ct. at 1133 (emphasis added).

[26] Slip Op. at 5.

Court's holding on point, the panel concluded, "[w]hile a democratic check may not suffice to protect union members against all union action, it does suffice to protect employees against negligent representatives."[27] Le'Mon submits that *O'Neill*'s language is unequivocal and across the board. It simply does not admit of the eviscerating exception the panel creates out of whole cloth.[28]

The panel acknowledges Le'Mon's position that "the Union's representatives' exhortation to continue the strike after they learned of its possible illegality goes beyond mere negligence."[29] Le'Mon has show, *in the record before the NLRB*, that SMW agents, namely the union attorney derelict in making the filing of the 8(d) notice, *knew that the notice was not filed.*[30] Thus, this is *not* merely a question, as the panel erroneously suggests, of Le'Mon's wish to "characterize [the evidence] differently."[31] The record, with no "characterization" needed, shows differently.

Neither is it a question of Le'Mon's making a contention "that the Union's conduct deserves sanction on his imputation of knowledge of illegality to the Union representatives" and "the Board [finding] that they did not know . . ."[32] Instead, it is a question of whether there is "substantial evidence" to support the

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[27] Slip Op. at 8.

[28] As in *Le'Mon I*, the panel does not explain how the "ouster remedy" restores the terminated employees jobs and compensates them for lost earnings and benefits derived from earnings. A neutral observer, confronted with *Le'Mon I* and *Le'Mon II*, may be forced to conclude that a preconceived result is chasing some rationale.

[29] Slip Op. at 7.

[30] Tr. 7.

[31] Slip Op. at 7.

[32] Slip Op. at 8.

Board's conclusion that "the Union" did not know the 8(d) notice was not filed. As there are *admissions* of record that SMW's attorney had "guilty knowledge," there is no reason to examine the claim that other employees of the union did not. The Board (and the panel) never explain away the devastating impact the attorney's knowledge has on the correct result in this case; for "substantial evidence" *requires* the Board and reviewing courts to consider "the body of evidence opposed to the Board's view."[33] Admissions contradict the Board's and the panel's conclusion.

ISSUES OPENED BY *O'NEILL* AND *RAWSON* PRESENTED BY LE'MON BUT OVERLOOKED OR IGNORED BY THE PANEL

The panel in *Le'Mon II*, never addressed Le'mon's contentions that:

1) the SMW's failure to file the mandatory § 8(d) notice is *per se* a violation of the DFR;

2) the failure to file the 8(d) notice is "gross negligence" so far in excess of "mere negligence" as to be plainly *not* "adequate representation" under the DFR; and that

3) this case should be remanded to the Board for consideration, in the first instance, informed by *O'Neill* and *Rawson*.

And, of more fundamental concern to DFR jurisprudence generally, the panel provides not one word on the criteria to distinguish union conduct which is "arbitrary" (for which SMW is culpable in the panel's view) from union conduct which is "mere negligence" (for which the SMW is not culpable in the panel's view).

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[33] *Universal Camera v. NLRB*, 340 U.S. at 494 (1951); to hold otherwise would be to allow exactly the "judicial inertia" condemned in *American Ship Building Co. v. NLRB*, 380 U.S. at 318 (1965).

ARGUMENT

Issue 1: Is an employee terminated from employment properly denied the right to recover damages from the labor organization which is his "exclusive representative" under the duty of fair representation where:

A. his termination results from the failure of the labor organization to timely file a notice of intent to strike mandated by statute; and

B. the labor organization subsequently and repeatedly failed to timely advise the employee that the mandated notice had not been filed?

The Supreme Court's remand Order, *supra* at 6, mandated consideration of the record in light of its decisions in *Rawson* and *O'Neill*.

In considering *Rawson* it is essential to cite fully and completely—and not by shorthand reference alone—the language which contains the holding of the case.[34] That language is: "The courts have *in general* assumed that *mere negligence*, even in the enforcement of a collective–bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today."[35] On its own terms, then, *Rawson* cannot be cited for the sweeping proposition adopted by the panel that "mere negligence" can never be found to be a violation of the duty of fair representation, for that is only true in the "general" case. *Rawson*, as applicable here, stands for the

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[34] The SMW's *Rawson* analysis, SMW Br. 11, strays far from the mark on just this point. Rather than quoting all pertinent language from *Rawson*, as Le'Mon does here, SMW substitutes the woefully deficient shorthand "mere negligence" for the Court's actual holding. This approach necessarily leads SMW to the wrong conclusion.

[35] *Rawson*, 110 S.Ct. at 1911 (emphasis added).

proposition that in a unique case even proofs limited to merely negligent conduct can sustain the finding of a DFR violation.

The law clearly divides the category "negligence" into at least two primary subgroups. The first group of such cases includes those involving "simple negligence" or, as the Supreme Court termed it in *Rawson*, "mere negligence." Le'Mon concedes that "mere negligence" does not *generally* constitute a DFR violation under the holding in that case; however, on the facts, that principle does not apply here. The second negligence subgroup involves a more severe level of unjustifiable conduct, or "gross negligence." In distinction to "mere negligence," cases involving "gross negligence" are more aggravated. "Gross negligence is the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result."[36] It is, "a want of even scant care, but something less than intentional indifference to consequences of acts."[37]

It is clear that the *Rawson* Court selected the language used with utmost care. The Court does *not* say, for example, that under no conceivable set of circumstances could "negligence" in any degree, or to any extreme, establish a DFR violation. Nor does the Court use the word "negligence" in its blanket generic sense, with no qualifying adjective. Instead, it used the adjective "mere" *in conjunction with* the noun "negligence." "Mere" means "exclusive or considered apart from anything else: nothing

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[36] *Robinson Insurance and Real Estate, Inc. v. Southwestern Bell Telephone Co.*, 366 F. Supp. 307, 311 (W.D.Ark. 1973). *Accord Smith v. Hill*, 510 F. Supp. 767, 775 (D. Utah 1981).

[37] *Fidelity Leasing v. Dun & Bradstreet*, 494 F. Supp. 786, 790 (E.D.Pa. 1980).

more than: BARE (sic)."[38] Thus, *Rawson* plainly contemplates that in appropriate cases proof of something more than bare negligence or "mere negligence" can constitute a DFR violation.

The Supreme Court's decision in *O'Neill*[39] is also directed to the standards to which a labor organization is held in DFR cases. There, the Court, citing *Vaca*,[40] reaffirms that the general DFR standard is: "a union breaches its duty of fair representation if its actions are *either* 'arbitrary, discriminatory, *or* in bad faith'. . . ."[41] Addressing specifically that alternative ground for DFR liability predicated upon "arbitrary" conduct, the Court further held that: "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational."[42]

O'Neill specifically overruled the labor organization's defense that DFR "does not impose any obligation to provide *adequate* care."[43] Turning to analogies employed in earlier cases, the Court described the nature of DFR obligations. First, the Court noted that: "[T]he exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf."[44] Next, the Court reaffirmed that: "The duty of fair representation is thus akin to

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[38] WEBSTER'S NEW COLLEGIATE DICTIONARY 713 (1981).

[39] *Supra* n. 15.

[40] *Vaca v. Sipes*, 386 U.S. 171 (1967).

[41] *O'Neill*, 111 S.Ct. at 1130 (emphasis added).

[42] *Id.* (Citations omitted.)

[43] *O'Neill*, 111 S.Ct. at 1133.

[44] *O'Neill*, 111 S.Ct. at 1133 (citing *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 (1944)).

the duty owed by other fiduciaries to their beneficiaries."[45] The Court continued, "[j]ust as these fiduciaries owe their beneficiaries a duty of care, as well as a duty of loyalty, *a union owes employees a duty to represent them adequately* as well as honestly and in good faith."[46]

The *O'Neill* Court explained how the DFR standard it elucidated is to be applied. "Any substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need *for the effective performance of their bargaining responsibilities.*"[47] And the decision must take into account, "the rationality of a union's decision in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made."[48]

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[45] *O'Neill*, 111 S.Ct. at 1134 (citing *Teamsters v. Terry*, 494 U.S.___, 110 S.Ct. 1339 (1990).

[46] *Id.* (emphasis added).

[47] *O'Neill*, 111 S.Ct. at 1135 (emphasis added).

[48] *O'Neill*, 111 S.Ct. at 1136.

SMW claims that it "could not have foreseen that a union had a duty of fair representation regarding actions which affected the majority of its employees. * * * To the extent *O'Neill* recognizes a duty of fair representation in performing acts which may have an unintended adverse consequence on a majority of its employees, the Union could not have foreseen such a duty." SMW Br. 8.

Le'Mon, in response, would point out that: the events leading to the NLRB charges filed here occurred in 1985; DFR obligations have accompanied labor organization privileges as "exclusive representative" under labor statutes since *Steele*, *supra* n. 43, was decided in 1944; *O'Neill* adheres to established DFR principles, simply defining in a concrete context what "arbitrary" means; *O'Neill* does not graft a new standard onto the law, but, identifies as an approved source of applicable fiduciary law the 1959 Restatement (Second) of Trusts § 174. *O'Neill*, 111 S.Ct. at 1134.

In any event, SMW's "could not have foreseen" defense utterly fails to take into account the principles set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

The Court noted that the union's negotiated settlement leading to the complaint in *O'Neill*, "[a]t the very least . . . produced certain and prompt access to a share of the new jobs and avoided the costs and risks associated with major litigation."[49]

SMW's series of derelictions is not the case of an isolated act of simple or "mere negligence" under *Rawson*. Instead, "the record as a whole" shows there is a pattern of defaults which amounts to "the failure to observe even slight care" and "carelessness or recklessness to a degree that shows utter indifference to consequences of acts" within cases concerning "gross negligence" cited above.[50] Therefore, SMW is liable to Le'Mon for NLRA violations under the *Rawson* principle.

SMW is equally culpable under *O'Neill*. The failure to file the § 8(d) notice, is a mandatory statutory duty that could be fulfilled *only* by SMW, and not by Le'Mon or the other employees. SMW's failure to fulfill a mandatory statutory duty falls far short of its "fiduciary" responsibility. SMW most certainly failed to represent those employees "adequately." SMW did not "act[ ] in their interest and on their behalf." SMW's failures are the antithesis of the SMW's "effective performance of . . . bargaining responsibilities." SMW's failures are *not rational* "in light of both the facts and legal climate that confronted [SMW] at the time. . . ."[51] And, in marked contrast to the negotiated settlement in *O'Neill*, which produced a beneficial result for at least some represented employees, SMW's actions here sacrificed the jobs of all represented employees, with no mitigating benefit whatsoever. These conclusions regarding

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[49] *O'Neill*, 111 S.Ct. at 1137.

[50] *Robinson Insurance and Real Estate, Inc.* and *Fidelity Leasing*, respectively, *supra* notes 29 and 30.

[51] The § 8(d) notice requirements were not new when SMW's 1985 strike of Aztech occurred. They were added to the NLRA by the Taft–Hartley amendments in 1947.

SMW's culpability under *O'Neill*, as in *Rawson*, apply both to the failure to timely file the § 8(d) notice, but more forcefully to the repeated failures to advise employees that the notice had not been filed, and of their peril in striking in the teeth of that fact.

ISSUE 2

Issue 2: If, as the panel held, the duty of fair representation denies an employee damages from his "exclusive representative" for his termination from employment resulting from the representative's failure to file a timely notice of intent to strike mandated by statute and to advise the employee that that notice has not been filed, is the statute's grant of such an immunity to the representative void on constitutional grounds, and the employee entitled to recover for the consequent violation of his constitutional rights.

If the facts and legal principles stated above preclude Le'Mon's recovery against SMW under the DFR, serious and substantial constitutional questions are presented which are worthy of consideration by the panel and the Court *en banc*. For this result would mean that otherwise faultless employees subject to the "exclusive representative" provisions of Federal labor statutes *and* the concomitant duty of the labor organization to file the § 8(d) notice have no redress when the labor organization utterly fails to fulfill that duty.

Such a result would vitiate settled understandings that labor organizations' duties are "highly fiduciary,"[52] that the DFR is "jealously guarded by the judiciary,"[53] and that it provides a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of

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[52] *National Maritime Union v. Herzog*, 78 F. Supp. at 172 (D.D.C.), *aff'd.*, 334 U.S. 854 (1948).

[53] *Augspurber v. Locomotive Engineers*, 510 F. 2d 853 (8th Cir. 1975).

federal labor law."[54] Moreover, "[I]t cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise, the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect."[55]

Precisely that Fifth Amendment question must be decided, should the Court reach Issue 2. For the constitutionality of the NLRA was sustained against challenges under the Constitution, including the Fifth Amendment, in *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937), upon the statutory construction that employees retained the right to contract for themselves. Subsequently, on statutory grounds and without constitutional issues being presented, the "exclusive representation" principle was sustained, negating the ability of employees to make contracts for themselves different from the one the "exclusive representative" negotiated. *NLRB v. J. I. Case Co.*, 321 U.S. 322 (1944). Later cases have not decided the constitutionality of "exclusive representation" in a case, such as this one, where a union acting as the "exclusive representative" of employees under Federal statute fails to fulfill representational duties imposed by the statute to the clear detriment of represented employees, and then interposes the DFR as a defense to the victimized employees' claims for damages.[56] In such a case, the Fifth Amendment claim is squarely presented for decision.[57]

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[54] *Vaca v. Sipes*, 386 U.S. at 182 (1967).

[55] *Steele v. Louisville & Nashville R.R.*, 323 U.S. at 208 (1944) (Murphy, J., concurring).

[56] Le'Mon submits that it is perverse to allow the DFR to be used as a defense to employees' losses, as SMW employs it here with the panel's approval. The DFR, instead, was crafted to be a basis for relief, a "bulwark."

[57] Le'Mon has not presented this constitutional claim previously. The NLRB does not decide constitutional questions. *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, ___ U.S. ___, 108 S. Ct. 1392 (1988). *Le'Mon I* was vacated on certiorari. And constitutional issues are outside this

CONCLUSION

The foregoing facts and case law establish that *Le'Mon I* presents a seriously flawed interpretation of the duty of fair representation. As this submission demonstrates, it is an interpretation reached by failing to address Le'Mon's arguments that SMW's failure to file the notice mandated by statute is a *per se* violation of the DFR, or, at minimum is "gross negligence" which establishes a DFR violation. It is also an interpretation that relies totally on a one–sided view of the evidence that refuses to take into account SMW's dispositive *admissions* of fact, in violation of the "substantial evidence" requirement. And, it is an interpretation that relies upon shorthand labels for *O'Neill* and *Rawson* that restrictively parse their holdings. In short, the decision immunizes labor organizations granted extraordinary powers as "exclusive representatives" from liability for the damages they cause represented employees by failing to fulfill statutorily mandated duties.

That interpretation of the DFR raises serious and substantial questions under the Fifth Amendment. Therefore panel rehearing or rehearing *en banc* should be granted to correct the interpretation of the duty of fair representation that denies a

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Court's Order of May 10, 1991 requesting briefs on identified issues following remand. This, then, is the first opportunity for Le'Mon to present this claim to this Court.

remedy to represented employees situated as Le'Mon or to address and answer the Fifth Amendment questions raised if that interpretation is not rectified.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Hugh L. Reilly, hereby certify that I served two copies of the foregoing Appellant's Petition For Panel Rehearing With Suggestion For Rehearing *En Banc*, on Friday, January 31, 1992, by Express Mail, postage prepaid, addressed to counsel as follows:

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No. 91-2049

In the Supreme Court of the United States

OCTOBER TERM, 1992

PETE LE'MON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a union had not acted arbitrarily, in violation of its duty of fair representation, by failing to give timely notice of a labor dispute to mediation authorities before calling a strike and by encouraging employees to continue the strike after they had been discharged because of the untimely strike notice.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals after remand from this Court (Pet. App. 3a-8a) is reported at 952 F.2d 1203. The earlier opinion of the court of appeals (Pet. App. 11a-20a) is reported at 902 F.2d 810. The decision and order of the National Labor Relations Board (Pet. App. 21a-29a), including the decision of the administrative law judge (Pet. App. 30a-48a), are reported at 291 N.L.R.B. 282.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1991. A petition for rehearing was denied on March 24, 1992. Pet. App. 1a-2a. The petition for a

writ of certiorari was filed on June 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed at the Albuquerque, New Mexico, manufacturing plant of Aztech International, Ltd. (the Company). The Company's employees were represented by the Sheet Metal Workers' International Association Local Union No. 49, AFL-CIO (the Union), and were covered by a collective bargaining agreement effective through September 30, 1985. Pet. App. 31a-32a. In the Spring of 1985, the Union initiated negotiations for a new agreement. Thereafter, the employees voted to authorize the Union to call a strike should negotiations fail. On September 30, Union Business Agents Gary Briggs and George Gilliland met with the employees to discuss the Company's final contract offer. Briggs expressed the view that the offer was inadequate. He told the employees that their only options were to accept the contract or to strike, and he explained that a strike entailed the risk that they would be replaced or fired. *Id.* at 33a-35a. On October 1, the employees went on strike, and established a picket line at the Company's premises. *Id.* at 35a.

On the day the strike began, Company President Bennett King hand-delivered or mailed to each of the strikers a letter stating that the strike was illegal because the Union had failed to give proper notice of a labor dispute to the Federal Mediation and Conciliation Service (FMCS);[1] therefore, the letter stated, the National Labor

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[1] Section 8(d)(3) of the Act, 29 U.S.C. 158(d)(3), requires a party seeking termination or modification of a collective agreement to give the FMCS notice at least 30 days before the expiration of the contract. Section 8(d)(4), 29 U.S.C. 158(d)(4), precludes a strike within 60 days of the requisite notice. Section 8(d) further

Relations Act (the Act) did not protect the strikers from discharge, and the strikers were discharged effective immediately. The letter added that strikers who wished to return to work would have to fill out applications to be hired as new employees. Pet. App. 35a-36a.

When several strikers asked Briggs and Gilliland about the Company's discharge letter, they responded that it was a "ploy" and "rhetoric." The Union agents advised the employees to "stick together." Briggs added that, regardless of the legality of the strike, the strikers could prevail if they could put enough pressure on the Company. Pet. App. 22a, 36a.[2] On October 5, an article in a local paper reported that the National Labor Relations Board's Regional Office had issued an unfair labor practice complaint based on the Company's charge that the notice was untimely. The article quoted a Board official's assertions that the picketing was unlawful. *Id.* at 36a. After publication of the article, Briggs and Gilliland continued to tell strikers that the discharges were a company tactic and that the strikers should "stick together" and try to win the strike. *Id.* at 22a, 36a.

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provides that "[a]ny employee who engages in a strike within [the 60 day] period * * * shall lose his status as an employee of the [struck] employer * * * for the purposes of [the Act]." Pet. App. 56a-58a.

[2] Neither Briggs nor Gilliland was aware that the Section 8(d)(3) notice was late. Pet. App. 33a. The Union's attorney, Gerald Bloomfield, had in fact mailed untimely notice to the FMCS on September 11, and the FMCS received it on September 17, 13 days before the contract was to expire. *Id.* at 32a-33a. Upon learning of the Company's letter, Briggs attempted to reach Union Attorney Bloomfield to ask about the notice, but Bloomfield was out of town. Briggs spoke with another attorney in Bloomfield's office but was unable to learn the date or circumstances of the filing. *Id.* at 37a. Briggs and Gilliland thought that the Company was mistaken in contending that timely notice of the strike had not been given.

By October 7, most of the strikers had abandoned the strike. Briggs then told the remaining strikers that the strike had been lost and that they should try to go back to work. Pet. App. 37a. Some strikers who had not been replaced were rehired immediately by the Company; others were rehired subsequently. All of the strikers who were rehired came back as new employees. *Ibid.*

Employees subsequently filed a petition with the Board's Regional Office seeking an election to decertify the Union as their collective bargaining representative. When the Union received the petition, it disclaimed interest in representing the employees. Pet. App. 37a-38a.

2. Based on petitioner's charge, the Board's Regional Office issued a complaint alleging that the Union breached its duty of fair representation under Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by its conduct respecting the strike. Pet. App. 30a-31a. The Board (Chairman Stephens dissenting in part), in agreement with the administrative law judge, dismissed the complaint. *Id.* at 24a-25a.

The Board explained that, while the Union's representation here "may not meet the standards of competence and caution that the Board would like to see observed[,] * * * [a] breach of duty of fair representation occurs only when the representative's conduct is 'arbitrary, discriminatory, or in bad faith.'" Pet. App. 24a (citing *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967)). Applying that standard, the Board unanimously agreed with the ALJ that the Union's failure to ensure that the strike did not commence until sixty days after a timely filing of the notice was "no more than mere negligence," and therefore

did not violate the duty of fair representation.[3] Pet. App. 22a.

The Board majority also found that the Union's conduct after October 2 "was not so lacking of a rational or logical basis as to be arbitrary." Pet. App. 23a. The Board explained that the Union agents thought that job loss was a risk in any strike, and that tactically the employees' "best protection" was to continue the strike even if the notice was deficient. Moreover, "even if the agents had understood that the strikers lost status as employees of the [Company] by operation of statute or had in fact been permanently discharged * * *, there was little they could do to benefit the employees at that point." *Id.* at 23a-24a. Since the employees had to apply for jobs as new employees, the Board concluded that "[i]t was not unreasonable for the agents to assume that collective action in seeking reemployment would be more effective than individual action."[4] *Ibid.*

3. The court of appeals agreed with the Board that the Union had not breached its duty of fair representation. However, the court did not pass on the Board's conclusion that the Union conduct was not arbitrary within the meaning of *Vaca* v. *Sipes*. Rather, the court held that the duty of fair representation is not implicated when "the injury suffered is common to the majority of represented employees." Pet. App. 20a. The court explained

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[3] The Board assumed, arguendo, "that a union that takes action in 'reckless disregard' of its statutory duties to unit employees violates its duty of fair representation." Pet. App. 24a n.5.

[4] Chairman Stephens would have found "that the Union's business agents * * * behaved in a manner that went beyond mere negligence to reckless disregard of the harm to the employees through actions that they took after they were put on notice [as of October 2] of the clear possibility that the strike notice had not been timely given and that the [Company] was taking action against the employees because of this." Pet. App. 27a.

that, "[a]s the duty-of-fair representation doctrine has evolved, its function as the protector of minority and individual employee rights * * * has been emphasized consistently." *Id.* at 17a. Since "the injured party here is not an individual or group singled out for treatment different from that accorded the majority, but the entire class of [Company] employees represented by the Union," the court concluded that the employees, "by virtue of their majority status," had available to them the "powerful remedy of ouster"—which they used—and thus did not need the protection afforded by the duty of fair representation. *Id.* at 17a-18a.

4. On March 25, 1992, this Court granted petitioner's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration "in light of *Air Line Pilots Association International* v. *O'Neill*, 111 S. Ct. 1127 (1991), and *United Steelworkers of America, AFL-CIO-CLC* v. *Rawson*, 495 U.S. 362 (1990)." *Le'Mon* v. *NLRB*, 111 S. Ct. 1383 (1991).

5. On remand, the court of appeals disavowed its prior rationale, noting that "*O'Neill* holds * * * that the judicially-created duty of fair representation applies to 'all union activity,' * * * thereby invalidating our prior analysis." Pet. App. 4a. However, the court reaffirmed its previous ruling that the Union had not breached its duty of fair representation, agreeing with the Board that the Union's behavior was "negligent rather than arbitrary, and therefore not in violation of its duty." *Id.* at 5a. The court disagreed with petitioner and the dissenting Board member that "the Union representatives' exhortation to continue the strike after they learned of its possible illegality goes beyond mere negligence." *Id.* at 7a. The court also rejected petitioner's contention that "the Union acted with knowledge of the strike's illegality throughout the relevant period." *Ibid.* Rather, the

court accepted the Board's factual finding that the Union representatives "did not know" of the strike's illegality and they "were unable to verify the employer's claim of illegality and assumed that it was merely a tactic to break the strike." *Ibid.*

ARGUMENT

In *United Steelworkers* v. *Rawson*, this Court reaffirmed the rule of *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967), that a breach of the duty of fair representation "occurs 'only when a union's conduct * * * is arbitrary, discriminatory, or in bad faith.'" 495 U.S. at 372. The Court emphasized that "mere negligence * * * would not state a claim for breach of the duty of fair representation." 495 U.S. at 372-373. In *Air Line Pilots Ass'n Int'l* v. *O'Neill*, 111 S. Ct. 1127, 1135 (1991), the Court held that the *Vaca* standard applies to contract negotiation as well as contract administration. But it cautioned that "[a]ny substantive examination of a union's performance * * * must be highly deferential" and that a union may be held to have breached its duty of fair representation only when its conduct is "wholly irrational or arbitrary." *Id.* at 1135-1136 (internal quotation marks omitted). The court of appeals correctly applied those principles in upholding the Board's determination that the Union had not breached its duty of fair representation in the circumstances presented in this case. There is no conflict among the circuits. Further review therefore is not warranted.

1. Petitioner claims (Pet. 12-16) that the court of appeals erred in upholding the Board's finding that the Union's conduct amounted to mere negligence. That fact-bound claim does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951). In any event, the Board's finding is supported by the evidence.

The credited testimony shows that the Union agents did not know that the notice to the FMCS had not been timely filed when the decision to strike was made. However, they did inform the employees that they might be permanently replaced or discharged if they struck.[5] Pet. App. 34a-35a, 45a. Moreover, the Board majority reasonably concluded that, although the Union agents "may have acted negligently" after learning of the Company's discharge letter on October 2, "their conduct was not so lacking of a rational or logical basis as to be arbitrary." *Id.* at 23a. Unable to reach their attorney, the agents acted within the limits of "their competence and experience" (*ibid.*) in telling the employees that the letter was company "rhetoric" or a company "ploy," and in urging them to "stick together." *Id.* at 22a.

As the Board explained (Pet. App. 23a), "[t]he agents were not lawyers and did not seem to understand the effect that the failure to give proper 8(d) notice had on the strikers' status as employees"; indeed, as shown by their earlier warning as to the risks of a strike, they did not even "appreciate the distinction between terminating strikers' employment and replacing strikers."[6] *Ibid.* Accordingly, "[t]hey considered the Employer's statement that the strikers' employment was terminated as a tactical maneuver designed to break the strike," and "judged economic pressure to be the most effective strategy to deal with the situation." *Id.* at 23a-24a. Indeed, as the Board noted, "even if the agents had under-

[5] The Union agents mistakenly equated permanent replacement with discharge. See *NLRB* v. *International Van Lines*, 409 U.S. 48, 50-51 (1972).

[6] See *Freeman* v. *O'Neal Steel, Inc.*, 609 F.2d 1123, 1127 (5th Cir), cert. denied, 449 U.S. 833 (1980) ("union representative is not a lawyer and he cannot be expected to function as one"); accord *Harris* v. *Schwerman Trucking Co.*, 668 F.2d 1204, 1207 (11th Cir. 1982).

stood that the strikers lost status as employees of the Employer by operation of statute or had in fact been permanently discharged by the Employer," the employees' only other option at that point would be to apply for jobs as new hires. "It was not unreasonable for the agents to assume that collective action in seeking reemployment would be more effective than individual action." *Id.* at 24a.

2. a. Petitioner contends (Pet. 16-18) that the decision of the court of appeals conflicts with a pre-*Rawson* decision of the Ninth Circuit holding that negligence may constitute a breach of the duty of fair representation where "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." *Dutrisac* v. *Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir. 1983). Applying that principle, the Ninth Circuit in *Dutrisac* found that the union had breached the duty by its negligent failure to timely file a notice of arbitration over a grievance it believed to be meritorious. *Id.* at 1272, 1274.

Even before *Rawson*, the Ninth Circuit had made clear that *Dutrisac* did not establish a *per se* rule. In *Eichelberger* v. *NLRB*, 765 F.2d 851 (1985), the Ninth Circuit upheld the Board's determination that the union's negligent failure to timely inform a grievant that it would not seek arbitration of her grievance did not violate the duty of fair representation. Explaining *Dutrisac*, the court stated that, even where the union has failed to perform a ministerial act, "courts and administrative bodies are not constrained to find a breach, but must carefully weigh the circumstances of each particular case in light of established principles of law." 765 F.2d at 855. See also *Peterson* v. *Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985), cert. denied, 475 U.S. 1122 (1986).

In any event, the proposition that a negligent failure to perform a ministerial act may constitute a *per se* violation of the duty of fair representation is at odds with *Rawson*. There, in holding that mere negligence is not sufficient to establish a breach of the duty of fair representation, the Court made no distinction between a union's negligence in failing to perform a ministerial act or a so-called mandatory duty (as is alleged in this case) and its negligent failure to perform other obligations (such as the contractual obligation at issue in *Rawson*). As the facts here show, in both situations, the union's failure may be the result of simple negligence that is not properly characterized as arbitrary. Indeed, in a post-*Rawson* case, the Ninth Circuit acknowledged that "mere negligence" does not breach the duty of fair representation, and also recognized that "differentiating a ministerial task from a judgment call is not always easily accomplished" and is "in some sense illusory." *Peters* v. *Burlington N. R.R.*, 914 F.2d 1294, 1299-1300 (1990).

b. Petitioner further urges (Pet. 19) that, because of the critical role Section 8(d) notices play in promoting collective bargaining over strikes that disrupt commerce, "Congress could never have intended that national labor law should immunize such disruption were its source the unions' 'merely negligent' behavior." However, the fact that the union's failure is not a breach of its duty of fair representation does not "immunize" the disruption to commerce: as occurred here, the resulting strike is unprotected by the Act and the participating employees are subject to discharge. Petitioner is correct (Pet. 20) that a union's negligent failure to timely file the Section 8(d) notice has a severe effect on the striking employees. However, the consequences of the union's negligence on the employees—i.e., the loss of a job—is no greater than would be the case were the union to make negligent missteps in numerous other

contexts, such as grievance proceedings in which the jobs of one or more employees may be at stake.

Petitioner also asserts (Pet. 20-22) that duty of fair representation claims arising out of contract negotiation or grievance processing are different from claims based on a failure to fulfill a duty imposed by Section 8(d); the former activities require an exercise of judgment, whereas no exercise of judgment is called for in respect to an 8(d) notice. Accordingly, petitioner argues, applying a *per se* rule in the latter situation would not offend the teaching of *O'Neill* that a union must be accorded a "wide range of reasonableness" (111 S. Ct. at 1130), for there is no occasion to assess the reasonableness of the union's conduct and any failure to perform is therefore arbitrary as a matter of law.

There is no merit to petitioner's contention. This Court in *O'Neill* rejected the argument that the standard for assessing whether a union had fulfilled its duty of fair representation should vary according to the function performed by the union. It concluded that, whether the union activities subject to the duty of fair representation could be classified as "contract administration" or "contract negotiation," or "fall into neither category," the "tripartite standard announced in *Vaca* v. *Sipes*" was to be applied in determining if the duty had been breached. 111 S. Ct. at 1135. That standard requires that the union conduct constitute more than simple negligence. Since such negligence was all that the union committed here, the duty of fair representation claim must fail.[7]

[7] Petitioner also contends (Pet. 22-23) that a *per se* rule should apply here because the case involves the Union's "*nondisclosure* of information it alone possessed that was critical to the employees' welfare." That contention, however, is contrary to the factual findings of the Board, which were affirmed by the court of appeals. The Board found that the Union agents were unaware that

3. Finally, petitioner contends (Pet. 24-28) that Section 9(a) of the Act, 29 U.S.C. 159(a),[8] would be unconstitutional if a union's negligent failure to perform a duty mandated by Section 8(d) is not deemed a breach of the duty of fair representation. That is so, according to petitioner, because employees otherwise would be derived of liberty and property without due process of law since the union's statutorily conferred exclusive representative status forecloses any other means of obtaining compensation for loss of their jobs.

Petitioner's constitutional argument is not properly presented here because petitioner did not raise it before the Board. Under Section 10(e) of the Act, 29 U.S.C. 160(e), the courts of appeals lack jurisdiction to consider claims that were not urged before the Board, unless the failure to object to the Board is excused by "extraordinary circumstances." *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 n.10 (1979); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Moreover, petitioner did not timely raise the issue in the court of

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the Section 8(d) notice had not been timely filed when the strike decision was made and also were unaware of the legal significance of that failure.

[8] Section 9(a) provides that representatives selected by a majority of the employees in an appropriate bargaining unit shall be the exclusive representative of all the unit employees for purposes of collective bargaining, thereby extinguishing the right of any unit employee to deal individually with the employer for such purposes.

appeals[9] and suggests no reason why the Court should deviate from its "normal policy" of not considering issues not presented to the court of appeals. *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967).

In any event, petitioner's contention is mistaken. The contention is based on the premise that employees have a constitutionally conferred right to contract individually with their employer. Pet. 25-26. However, while the liberty interest protected by the Fifth Amendment may include a right of the individual to contract in appropriate circumstances, see *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972), this is "not an absolute right," but one which may be restricted by government "in the public interest." *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 392 (1937).[10]

In the area of labor relations, Congress, in order to promote industrial peace, established the principle of collective bargaining through an exclusive representative selected by a majority of the bargaining unit. That principle of "necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," *Vaca* v. *Sipes*, 386 U.S. at 182, and "extinguishes the individual employee's power to order his own relations with his employer." *NLRB* v. *Allis-*

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[9] Petitioner raised the constitutional issue for the first time in its petition for rehearing, which was denied. Pet. 10. Raising an issue for the first time in an application for discretionary review which is denied does not constitute raising the claim in the lower court for purposes of review by this Court. See *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531 (1992).

[10] Similarly, the Court has recognized that "[p]roperty interests * * * are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577.

Chalmers Mfg. Co., 388 U.S. 175, 180 (1967). In view of the exclusive bargaining representative's duty to represent fairly all employees in the unit, the Constitution does not preclude such extinction of individual employee rights, and the rights of individual employees are adequately protected by requiring the union to refrain from conduct which is "arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes*, 386 U.S. at 199; see also *id.* at 177; *United Steelworkers* v. *Rawson*, 495 U.S. at 372-373; *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 164 n.14 (1983). The Board found, and the court of appeals agreed, that the Union's conduct here was not in violation of that duty because, although it may have been negligent, it was not arbitrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETE LE'MON,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioner Pete Le'Mon hereby replies to the brief in opposition of respondent National Labor Relations Board ("NLRB").

ARGUMENT

1. The NLRB's "question presented" is disingenuous. Le'Mon's second question asks whether

> a violation of the duty of fair representation [is] established where the labor organization that is the employees' exclusive representative under § 9(a) failed to advise them that it had *not* fulfilled its mandatory duty

> to file the notice of strike required by § 8(d) both prior to the employees' vote on whether to ratify their employer's bargaining proposal or engage in a strike, and again after the strike began when that default was questioned—and, as a result, those employees were terminated from employment?[1]

The NLRB restates this question as

> [w]hether the [NLRB] reasonably concluded that a union had not acted arbitrarily, in violation of its duty of fair representation, by failing to give timely notice of a labor dispute before calling a strike and by encouraging employees to continue the strike after they had been discharged because of the untimely strike notice.[2]

Artfully, the NLRB excises the crucial elements that: (i) a key union agent, its attorney, concededly *knew the required § 8(d) notice had not been filed before the union called its* pre-*strike meeting of employees to reject the collective-bargaining agreement Aztech offered*; (ii) at that meeting and thereafter, the union *failed to inform the employees that it had not given the § 8(d) notice*; and (iii) as the predictable result of the union's failure so to inform them, while otherwise promoting the strike, the employees *lost their jobs*.

2.a. In the body of its brief, the NLRB first claims that Le'Mon's attack upon "the Board's finding that the Union's conduct amounted to mere negligence" is a "fact–bound claim [that] does not warrant review", and that (in any event) "the Union agents [Briggs and Gilliland] did not know that the notice to the FMCS had not been timely filed when the decision to

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[1] Petition in No. 91-2049, at i.

[2] NLRB Brief at I.

strike was made".[3] This begs the *legal* question of whether the union (and, through it, Briggs and Gilliland) was on notice of the untimeliness of the filing because *another* of its agents—its attorney—admittedly knew of that fact at all material times.

b. The NLRB then argues that Briggs' and Gilliland's "'conduct was not so lacking of a rational or logical basis as to be arbitrary'", because, "[u]nable to reach their attorney, [they] acted within the limits of 'their competence and experience' *** in telling the employees that [Aztech's] letter [referring to the illegality of the strike] was company 'rhetoric' or a company 'ploy'".[4] The NLRB does not explain, though, how it was within "their competence and experience" for Briggs and Gilliland to denounce Aztech's—and, indeed, the NLRB Regional Officer's—public position on the illegality of the strike as merely "rhetoric" and a "ploy". To the contrary: The NLRB concedes that they "'were not lawyers and did not seem to understand the effect that the failure to give proper 8(d) notice had on the strikers' status as employees'".[5] These circumstances compel characterization of their conduct as so devoid of a rational or logical basis as to be, not simply arbitrary, but patently *reckless*.[6]

The NLRB contends that, even had Briggs and Gilliland known the effect of their recklessness when confronted with Aztech's letter, "the employees' only other option at that point would [have been] to apply for jobs as new hires".[7] Not

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[3] *Id.* at 7-8.

[4] *Id.* at 8.

[5] *Id.*

[6] As the old adage has it, "The man who acts as his own lawyer has a fool for a client."

[7] NLRB Brief at 8-9.

necessarily. There is no evidence that, had the union immediately conceded the illegality of and terminated the strike, Aztech would not have mitigated its policy of treating the employees as discharged by operation of law. Moreover, through its attorney, the union was on notice of the failure to file the § 8(d) notice *before* the crucial, *pre*–strike meeting at which the contract was rejected—about which key event the NLRB maintains a suspicious silence. Had the union proceeded with even a modicum of concern for the employees' jobs at *that earlier* point, the latters' later discharges would never have occurred.

3.a. The NLRB then argues that there is no conflict among the circuits, because the Ninth Circuit has not held as a general rule that a union's negligent failure to perform a ministerial duty always violates the duty of fair representation under all conceivable circumstances.[8] This begs the specific question of whether here the union's failure to perform a ministerial duty *mandated by § 8(d)* is arbitrary *per se*, given the strong congressional policy behind, and the severe consequences to employees of the union's failure to provide a timely notice under, that section.

b. Similarly question–begging is the NLRB's contention that

> the consequences of the union's negligence on the employees—*i.e.*, the loss of a job—is no greater than would be the case were the union to make negligent missteps in numerous other contexts, such as grievance proceedings.[9]

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[8] *Id.* at 9-10.

[9] *Id.* at 10-11.

As the NLRB concedes, those "other contexts" "require an exercise of judgment [by the union], whereas no exercise of judgment is called for in respect to an 8(d) notice".[10]

Neither can the NLRB rely on *O'Neill*.[11] Le'Mon does not seek recognition of a *new* category of improper union behavior under the duty of fair representation, to supplement the tripartite standard of "arbitrary, discriminatory, or bad faith" conduct. Rather, he simply urges that a union's unexcused failure to fulfill the mandatory statutory duty of § 8(d) is *per se* "arbitrary" conduct under the traditional rule. To this position, the NLRB seems to oppose only the argument that union conduct *cannot* be "arbitrary" if it is only "negligent". Revealingly, the NLRB does not venture to explain how this conclusion follows where the union's act is mandated by statute, wholly nondiscretionary, and unquestionably crucial to preservation of the employees' vital interests in their jobs.

c. The NLRB also contends that the union's failure to disclose to the employees the untimeliness of the § 8(d) notice is counterfactual, because

> [t]he Board found that [Briggs and Gilliland] were unaware that the Section 8(d) notice had not been timely filed when the strike decision was made and also were unaware of the legal significance of that failure.[12]

This further begs the question. *First*, the NLRB's finding that *Briggs and Gilliland themselves* "were unaware" at any point in time says nothing about whether *the union* should have been

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[10] *Id.*

[11] *Id.*, *citing* Air Line Pilots Ass'n v. O'Neill, __ U.S. __, 111 S. Ct. 1127 (1991).

[12] NLRB Brief at 11-12 n.7.

deemed "[a]ware" at all times through the conceded knowledge of its attorney—thus rendering Briggs and Gilliland, too, vicariously knowledgeable of the facts. *Second*, that Briggs and Gilliland "were unaware" (if so) does not absolve them, or the union, of responsibility where, finally made cognizant by Aztech's letter of vast lacunae in both their factual *and legal* knowledge, nevertheless they plunged ahead with reckless disregard for both the facts and especially the legal consequences of those facts to the employees' rights.

4.a. The NLRB then denies that Le'Mon's constitutional argument is "properly presented here" because Le'Mon "did not raise it before the Board" and "did not timely raise the issue in the court of appeals".[13] To raise the issue before the NLRB, however, would have been feckless, as administrative agencies lack power to declare unconstitutional the statutes that confer authority upon them. And the issue did not become apparent in the court of appeals until the latter issued its decision, at which juncture Le'Mon realized that that court did not intend to take seriously this Court's remand in *Le'Mon I*. Thus, Le'Mon raised the issue at the first fair opportunity to do so. Under these circumstances, nothing precludes this Court from addressing it.[14]

b. On the merits, the NLRB once again begs the question. To argue that Congress may constitutionally extinguish the individual employee's power to order his own relations with his employer and transfer that power to an exclusive representative *when the representative is precluded from acting "arbitrarily,*

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[13] *Id.* at 12-13 (note omitted).

[14] Because this petition arose from the decision of a federal court, this Court's normal policy of not considering issues not decided by a court of appeals is *prudential* only, and should not be followed inasmuch as: (i) Le'Mon's constitutional question is squarely presented now and will be fully briefed hereafter; and (ii) the parameters of the duty of fair representation are "an important, recurring issue". Carlson v. Green, 446 U.S. 14, 17 n.2 (1980).

discriminatorily, or in bad faith"[15] does not answer Le'Mon's charge that, under the circumstances of this case, exclusive representation is unconstitutional precisely because the NLRB and the court of appeals have licensed the union to act in violation of statute to Le'Mon's profound detriment. The NLRB circuitously contends that no constitutional violation occurred because the union's failure to file the § 8(d) notice was not "arbitrary"—as if constitutional results could turn on the affixation of labels. The issue, however, is whether exclusive representation is constitutionally sufferable, whatever label may attach to the union's conduct, where that conduct: (i) violated a clear, mandatory statutory duty; (ii) resulted in the wholly predictable loss of Le'Mon's employment by operation of law; and (iii) under the view of the NLRB and the court of appeals, gives rise to *no* remedy against either the union, its attorney, or anyone else.

CONCLUSION

Unions' implementation of their duty of fair representation affects millions of American employees on a day–to–day basis. Unfortunately, the standard by which that duty is enforced is ambiguous. This case presents the Court with a rare opportunity to refine that standard under particularly exigent circumstances. For that reason, Le'Mon's petition should be granted.

Respectfully submitted,

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[15] *See* NLRB Brief at 13-14.

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